Brf. of Marshall for D. E.
Filed Dec. 31, 1895.

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JAMES H. MCKENNEY,
CLERK.

[15,957.]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STATE OF MISSOURI EX RELATIONE THE LACLEDE GAS LIGHT COMPANY,
Plaintiff in Error,

vs.

MICHAEL J. MURPHY, STREET COMMISSIONER OF THE CITY OF ST. LOUIS, AND THE CITY OF ST. LOUIS,
Defendants in Error.

No. 667.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

W. C. MARSHALL,
Attorney for Defendants in Error.

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STATEMENT.

This is a proceeding by *mandamus* to compel the street commissioner of the City of St Louis and the City of St. Louis to grant to relator the right to make excavations in the streets of the City of St. Louis for the purpose of constructing conduits for

carrying electric wires to be used for the distribution of electricity for lighting purposes.

An alternative writ issued by the Supreme Court of Missouri on the 10th of December, 1894, is as follows:

ALTERNATIVE WRIT.

In the Supreme Court of Missouri. Division No. 1. October Term, 1894.

The State of Missouri on the relation of The Laclede Gas Light Company,
vs.
Michael J. Murphy, Street Commissioner of the City of St. Louis, Respondent.

The State of Missouri to Michael J. Murphy, Street Commissioner of the City of St. Louis:

Whereas the said Laclede Gas Light Company, lately in our Supreme Court, at the October Term, 1894, thereof, held at the City of Jefferson, on the 26th day of November, 1894, gave the same court to understand and be informed, to-wit, by the petition of said relator verified by affidavit filed in said court on said day, that you, the said Michael J. Murphy, street commissioner of the City of St. Louis, have arbitrarily, unlawfully, and contrary to your duty in that behalf, refused and still refuse to issue to said relator a certain permit by said relator applied for, as will more fully appear by reference to said petition, which is in the words and figures following, to-wit:

To the Honorable, the Judges of the Supreme Court of the State of Missouri.

The Laclede Gas Light Company, relator herein, gives the court to understand and be informed that

it, the said relator, is a body politic duly incorporated by an Act of the General Assembly of the State of Missouri, approved March 2d, 1857, entitled: "An act to incorporate The Laclede Gas Light Company:" that subsequently said act of March 2d, 1857, was amended by certain supplemental and amendatory acts, viz: "An act supplementary and amendatory of an act entitled 'An act to incorporate the Laclede Gas Light Company,'" approved March 3d, 1857; and "An act to amend an act to incorporate The Laclede Gas Light Company, approved March 26th, 1868; which said three Acts of the General Assembly of the State of Missouri are in words and figures, as follows:

An act to incorporate the Laclede Gas Light Company.

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. James M. Hughes, Edward Bredell, Robert Holmes, John C. Rust, Charles Gibson, Samuel H. Gardner, Henry A. Clover, and Archibald Gamble be, and they are hereby created and constituted a body politic and corporate by the style of "The Laclede Gas Light Company," and by that name they and their successors and assigns shall have perpetual succession, may contract and be contracted with, sue and be sued, and may also hold and convey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purposes of the said corporation and the prosecution of its legitimate business.

§ 2. The capital stock of said company shall be fifty thousand dollars, and the same may be in-

creased to two million dollars, which shall be divided into shares of one hundred dollars each.

§ 3. The affairs of said company shall be conducted by a board of not less than five directors, and such officers and agents as they may deem necessary; said directors to be chosen annually by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their offices for one year, and until their successors are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations, for the transaction of the business of said company; and, under the direction of the stockholders, may have absolute power over all the property and effects of said company. They may also fill vacancies in their board until the next regular election.

§ 4. The said corporators, or a majority of them, may at any time open books in the City of St. Louis for subscription to the capital stock of said company, and, upon the sum of fifty thousand dollars being subscribed, may organize said company under this charter.

§ 5. The said company, its successors and assigns, shall, within all that portion of the present corporate limits of the City of St. Louis, in St. Louis County, not embraced within the corporate limits of said city, as established by the act entitled "An act to incorporate the City of St. Louis," approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any

substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in said portion of said corporate limits all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company.

§ 6. The City of St. Louis and said company may make any contracts they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. The said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent. added thereto, such value to be fixed by two appraisers, one to be chosen by the city and the other by the company, and if they cannot agree then the two thus chosen shall nominate a third man, and a decision of any two of the three shall be binding; and upon such purchase being made all such property and effects, and all rights and privileges granted to said company, shall immediately pass to and vest in said city. If said city fail so to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the

further period of thirty years after the expiration hereof.

§ 7. Any person or body corporate who shall, within said portion of said corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to such company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be a new offense under this section.

§ 8. The said company and this act is hereby exempted from the operation of sections 6, 7, 13, 14, 15, 18 and 20, of article first of the act entitled, "An act concerning corporations," approved November 23, 1855.

§ 9. This act shall take effect from its passage, and shall continue in force for thirty years.

Approved March 2, 1857.

An act supplementary and amendatory of an act entitled "An act to incorporate the Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. The act to which this act is amendatory is hereby amended as that the words "sole and exclusive," in the fifth section of the act are stricken out.

§ 2. The City of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage.

Approved March 3, 1857.

An act to amend an act to incorporate "The Laclede Gas Light Company." Approved March 2d, 1857.

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. The said "Laclede Gas Light Company," shall, and may within the corporate limits of the City of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

§ 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

§ 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company, and the sixth section of the said act to which this act is amendatory is hereby repealed.

§ 4. An act entitled "An act supplementary and amendatory of an act entitled an act to incorporate the Laclede Gas Light Company," approved March 3d, 1857, is hereby repealed.

§ 5. This act shall take effect from its passage. Approved March 26th, 1868.

Said relator further shows to the court: That said act of March 2d, 1857, as amended by said subsequent acts, constitutes the present charter of the relator, which charter it has duly accepted, under which it has organized and carried on business, and which is in full force and effect. That by said charter relator is granted the privilege and right of lighting the City of St. Louis throughout its corporate limits, and of making and vending gas, gas lights, gas fixtures, and any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures, or other thing properly required therefor, relator shall do the same with as much dispatch and as little inconvenience to the public as possible.

And by said charter relator is invested with all other powers necessary to execute and carry out the privileges and powers expressly granted to it, but relator further states and shows to the court that on the 28th day of February, 1873, a certain agreement, known as the "Tripartite Agreement," was made and executed by and between the City of St. Louis, the St. Louis Gas Light Company and the Laclede Gas Light Company, to-wit, this relator, in and by which agreement, for certain valuable considerations therein set forth, this relator abandoned and surrendered any and all *exclusive* rights and all claims or pretenses of claims of sole or exclusive privilege or right of lighting any part of the City of

St. Louis with gas, or making or vending gas, gas lights, or gas fixtures, and also all exclusive rights whatsoever under its said charter.

Relator further states that in pursuance of the terms and its charter it has for a long time past been engaged in the lighting business, both by gas and electricity; that under a contract with the City of St. Louis it is lighting a part of the public streets and alleys of said city by electricity, and will be obliged to do so for a number of years to come; that it is furnishing light by means of gas or electricity to many thousands private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of the City of St. Louis as it was at all times authorized to do by its said charter, nor has the City of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wires strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity. as well to furnish light to private consumers as for the fulfillment by relator of its said contract with said City of St. Louis for the lighting

by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which if and when accidently diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents and in order to provide more effective and proper service, relator has made arrangements to lay its wires under ground along and under the streets of said city according to approved and practicable plans and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

Relator states that Michael J. Murphy is and was at or before the time hereinafter referred to, street commissioner of the City of St. Louis duly appointed, qualified and acting as such under its charter, and as such are committed to him under said charter the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto.

Relator further states that having completed its preparation to carry out the work above indicated and having given previous notice of its intention to do so to the said street commissioner of the City of St. Louis, it did on the 30th day of October, 1894, proceed with a number of men required for that purpose to begin the work of excavating at a point on the east side of Broadway, being one of the public streets of said city, near the corner of Mound street, the said point being adjacent to relator's

generating plants, which work of excavating was proper and necessary for placing its wires under ground; whereupon a police force of the City of St. Louis, acting under the instruction and at the instigation and request of said Michael J. Murphy, respondent, who was therein acting as street commissioner of said city, stopped relator's men from proceeding with said work, and caused relator's employes engaged in said work to be arrested, and said street commissioner, respondent herein, notified relator that he would not allow any part of any street of said city to be excavated for any purpose whatever without a permit previously obtained from him for that purpose as provided by ordinance. And relator states that by Section 568, Article 1, Chapter 15, of the Revised Ordinance, 1887, of said City of St. Louis, it is provided, that: "No person "shall make or cause to be made any excavation on "any public street, highway or alley, without writ- "ten permission of the street commissioner so "to do, excepting public work done under the "authority of the water or sewer commissioner, who "at the time of ordering any such excavation shall "notify the street commissioner of the same."

That upon being so notified by said respondent, street commissioner as aforesaid, relator applied to said respondent, as such street commissioner, for a permit to make the necessary excavation on Broadway so that it might lay its wires under ground for the purposes aforesaid and in pursuance of its said charter rights and privileges, but said street commissioner arbitrarily, unlawfully and contrary to his duty as such street commissioner in that behalf,

refused and still refuses to issue to relator any permit to excavate any part of any street of said city for said purpose, and also refused and still refuses to let relator make any such excavation without a permit, and threatens and still threatens to cause the arrest of any person who might thereafter enter upon or begin any such excavation for said purpose of laying any wire of relator's under ground, so that relator has been and is by said street commissioner absolutely prevented from exercising one of its vested rights granted by the State of Missouri and hitherto exercised by relator without let or hinderance, viz: to lay down in the streets of St. Louis all pipes, fixtures, or other thing properly required, in order to carry on the business for which relator's corporation was organized.

Relator states and shows to the court that it was and is the duty of said Michael J. Murphy, as such street commissioner of the City of St. Louis, to issue to it, said relator, a permit such as by it applied for as aforesaid, so that relator may without interference by the police or other authorities of said city exercise its charter powers and rights in that behalf above mentioned.

And relator states that by reason of the premises relator has been and is entirely without remedy in the premises unless it be afforded by the interposition of this Honorable Court by its writ of *mandamus*, and it therefore prays that a writ of *mandamus* may issue against said Michael J. Murphy, Street Commissioner of the City of St. Louis, commanding him to issue a permit to the relator to make an excavation along the east side of Broadway as near the

curb as practicable and extending from the southeast corner of Mound street and Broadway to the southeast corner of Olive and Broadway, in so far as such excavation may be necessary for the purpose of laying relator's electric wires under ground, the same to be done with as much dispatch and as little inconvenience to the public as possible. And relator prays for such other process, orders and remedies as may to the court seem meet and proper.

THE LACLEDE GAS LIGHT COMPANY,
by Isaac H. Lionberger, Vice-President.

HENRY HITCHCOCK,
LIONBERGER & SHEPLEY and
G. A. FINKELNBURG,
Attorneys for Relator.

State of Missouri, }
City of St. Louis. } ss.

Isaac H. Lionberger, undersigned, being first duly sworn, on his oath states, that affiant is the vice-president of the Laclede Gas Light Company, the petitioner and relator in this behalf; that affiant has read the foregoing petition and knows the contents thereof, and that the several matters and things in said petition set forth are true to the best of his knowledge and belief.

ISAAC H. LIONBERGER.

Subscribed and sworn to before me this Nov. 23d, 1894.

(Notary's Seal.) GEORGE M. BLOCK,
Notary Public.

Term expires June 28, 1897.

And whereas upon consideration thereof it was ordered that an alternative writ of *mandamus* should issue:

Now, therefore, you, Michael J. Murphy, Street Commissioner of the City of St. Louis, are hereby commanded to forthwith issue to the said Laclede Gas Light Company a permit to make an excavation along the east side of the public street called Broadway in the City of St. Louis, State of Missouri, as near the curb as practicable, and extending from the southeast corner of said Broadway and Mound street to the southeast corner of Broadway and Olive street in said city, so far as such excavation may be necessary for the purpose of laying under ground the electric wires of said Laclede Gas Light Company, the same to be done with as much dispatch and as little inconvenience to the public as possible, or that you show cause before this court on the 14th day of January, A. D. 1895, why you refuse to do so.

Witness the Honorable Francis M. Black, Chief Justice of the Supreme Court of Missouri, the 10th day of December, A. D. 1894. Issued at office in the City of Jefferson, State of Missouri, under the seal of the said court, the day and year last aforesaid.

JNO. R. GREEN,
Clerk of said Court.

RETURN.

Respondents made the following return to the alternative writ:

In the Supreme Court of Missouri. October Term, 1894.

State of Missouri *ex rel.* The Laclede Gas Light Co., Relator,
vs.
M. J. Murphy, Street Commissioner of the City of St. Louis, Respondent.

Now comes said respondent and for return to the alternative writ of *mandamus* heretofore issued in this case commanding respondent to show cause why he refuses to issue a permit to relator to make an excavation along the east side of Broadway from the southeast corner of Mound street and Broadway to the southeast corner of Olive street, in the City of St. Louis, for the purpose of laying electric wires under ground, respectfully represents and shows unto the court, that it is true, as stated by relator, that the General Assembly of Missouri, by an act entitled: "An act to incorporate the Laclede Gas Light Company," approved March 2d, 1857, and by an act entitled: "An act supplementary and amendatory of an act entitled: 'An act to incorporate the Laclede Gas Light Company,'" approved March 3d, 1857, the relator became a body corporate; that it is also true that the General Assembly of Missouri passed an act entitled: "An act to amend an act to incorporate 'The Laclede Gas Light Company.'" approved March 26th, 1868.

Respondent further shows unto the court that said act, approved March 2d, 1857, constitutued James M. Hughes and seven (7) others a body politic and corporate under the style of "The Laclede Gas Light Company," and provided that, "by that name they and their successors and assigns shall

have perpetual succession," and that said company "shall, within all that portion of the present corporate limits of the City of St. Louis, in St. Louis County, not embraced within the corporate limits of said city, as established by an act entitled, 'An act to incorporate the City of St. Louis,' approved February 8th, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same and of making and vending gas, gas lights, gas fixtures and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in said portion of said corporate limits all pipes, fixtures or other thing properly required in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company;" that by said act it was further provided that "the said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects with twenty per cent. added thereto, such value to be affixed by two appraisers, one to be chosen by the city and the other by the company, and if they cannot agree then the two thus chosen shall name a third man, and the decision of any two of the three shall be binding; and upon such purchase being made all such property and effects, and all

rights and privileges granted to said company shall immediately pass to and vest in said city.

If said city fail so to purchase said property and effects then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof;" that it was further provided by said act that said company should be exempted from the operation of Secs. 6, 7, 13, 14, 15, 18 and 20 of Art. 1, of an act entitled: "An act concerning corporations," approved November 23, 1855; that it was provided by Sec. 9 of said act as follows: "This act shall take effect from its passage, and shall continue in force for thirty years."

Respondent further shows unto the court that by the supplementary act, approved March 3d, 1857, it was provided that the words "sole and exclusive" in the 5th section of the act approved March 2d, 1857, should be stricken out, and further that the City of St. Louis should not be compelled, in any purchase which it might make under the Act of March 2d, 1857, to pay more than the appraised value of the property and effects, without any additional percentage.

Respondent further shows unto the court that the act approved March 26th, 1868, entitled: "An act to amend an act to incorporate the Laclede Gas Light Company," approved March 2d, 1857, was as follows: "Section 1. The said 'Laclede Gas Light Company' shall, and may within the corporate limits of the City of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy forever, all the rights, privileges

and franchises granted to it by the 5th section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchise to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

Section 2. The capital stock of said company may be increased, from time to time, to such amount as may be necessary to carry on its business.

Section 3. Nothing in this act contained shall be considered as affecting the vested rights of the St. Louis Gas Light Company, and the sixth section of the said act to which this act is amendatory is hereby repealed.

Section 4. An act entitled: 'An act supplementary and amendatory of an act entitled "An act to incorporate the Laclede Gas Light Company," ' approved March 3d, 1857, is hereby repealed.

Section 5. This act shall take effect from its passage."

I.

Respondent further shows unto the court that the said act approved March 26th, 1868, is unconstitutional, null and void, and is in conflict with Par. 2 of Sec. 1, of Art. 8 of the Constitution of Missouri, 1865, which provides as follows: "No law shall be passed reviving or re-enacting any act heretofore passed, creating any private corporation, where such corporation shall not have been organized and commenced the transaction of its business within one year from the time such act took effect, or within

such other time as may have been prescribed in such act for such organization and commencement of business."

Respondent further shows unto the court that the Laclede Gas Light Company did not, within one year from the time the Act of March 2d, 1857, took effect, organize, neither did it commence the transaction of its business within one year after the said Act of March 2d, 1857, took effect, but on the contrary said Laclede Gas Light Company did not commence business until, to-wit, the year 1873, and therefore respondent avers that the act, approved March 26th, 1868, was in conflict with said Par. 2, Sec. 1, Art 8, of the constitution of 1865; and respondent further avers that said Act of March 26th, 1868, was an act reviving and re-enacting the Act of March 2d, 1857.

II.

Respondent further shows unto the court that said Act of March 26th, 1868, is null and void and in conflict with Sec. 25, Art, 4, of the Constitution of Missouri, 1865, which section is as follows: "No act shall be revived or re-enacted by mere reference to the title thereof; nor shall any act be amended by providing that designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every such case the act revived or re-enacted, or the act or part of act amended shall be set forth and published at length, as if it were an original act or provision."

Respondent further shows unto the court that said Act of March 26th, 1868, is an act reviving and re-

enacting the Act of March 2d, 1857, and that it does not set forth and publish at large the Act of 1857, as revived and re-enacted by the Act of 1868, and that in order to ascertain and determine the meaning of the Act of 1868 it is necessary to compare the Act of 1868 with the Act of 1857, and that without such comparison the Act of 1868 is wholly unintelligible; that the Act of 1868 refers to the rights, privileges and franchises granted by Sec. 5 of the act to which it is amendatory, which is the Act of March 2d, 1857, and that it is hence necessary to refer to the 5th Sec. of the Act of March 2d, 1857, to determine what rights, privileges and franchises were granted by that section, and that it is therefore null and void because it does not set forth and publish at length, as if it were an original act or provision, what rights, privileges and franchises were intended to be granted; and that said Act of March 26th, 1868, violates Sec. 25 of Art. 4 of the Constitution of Missouri, 1865, in that by the 3d section of said act it attempts to repeal the sixth section of the said act to which this act is amendatory, without setting forth and publishing at length, as if it were an original act or provision, the amendment; and that it is further void under said constitutional provision in that it strikes out from the Act of March 2d, 1857, designated words thereof; and that it is further void because it strikes out from Sec. 1 of the Act of March 2d, 1857, the words "and their successors and assigns shall have perpetual succession," and strikes out from Sec. 5 of the Act of March 2d, 1857, the words "during the continuance of this act" and substitutes therefor the word

"forever," without setting forth and publishing at length the said amendment as if it were an original act or provision.

III.

Respondent further shows unto the court that the charter of the relator by the terms of Sec. 9 of the Act of March 2d, 1857, expired on the 2d of March, 1887, and that relator therefore is not entitled to any of the privileges, rights or franchises claimed by it.

IV.

For further and separate return respondent shows unto the court that even conceding all that relator claims with reference to the validity of the Act March 26th, 1868, and of the Act March 2d, 1857, nevertheless relator is not entitled to the relief asked for in this case, because respondent says that it has never by any act been granted a franchise to make and vend electricity for any purpose whatever, but that whatever rights, privileges and franchises it ever enjoyed were confined to making and vending gas, gas lights, gas fixtures and any substance or material used as a substitute therefor, and that electricity whether used for lighting or power purposes is not a substance or material, and hence relator has not any right to make or vend the same anywhere.

Respondent further shows unto the court that relator has heretofore placed its pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound street to Olive street, and at divers and sundry other places beneath the surface

of the streets of the City of St. Louis, for the purpose of transmitting and vending and supplying gas to consumers in the City of St. Louis; that in order to convey electricity it is necessary to carry the same by means of wires strung on poles above the surface of the streets or by means of wires strung in non-conductive tubes or conduits beneath the surface of the streets, and that relator has never acquired from the State of Missouri or the City of St. Louis any right to place such wires above or beneath the streets of said city.

V.

That it is provided by Sec. 2721 of Art. 5 of Chap. 42, Rev. Stats. 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through the municipal authorities thereof.

VI.

And that it is provided by Art. 2, Chap. 15, Rev. Ordinance of the City of St. Louis, 1887, as the same has been amended by Ord. No. 16,894, that no wires, tubes or cables conveying electricity for the production of light, heat or power, shall hereafter be placed along or across any of the streets, alleys or public places in the City of St. Louis, by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with Ordinance No, 12,723, now amended, or shall be duly authorized by the municipal assembly, and then only upon condition that such person, corporation or association so author-

ized by ordinance, before placing its wires, tubes and cables underground, shall file in the office of the Board of Public Improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insolated, together with a plat showing the route of such wires, tubes and cables, and that thereupon, if the same is approved, the Board of Public Improvements shall grant a permit therefor, subject to such restrictions, regulations and qualifications as may be prescribed by said board and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting, and that whenever an alley is available for placing such wires, tubes, or cables, the same shall be placed in or under alleys and not along or under streets; that relator has never accepted the provisions of said article and chapter, nor of said Ordinance No. 16,894, nor has it ever been authorized by the Municipal Assembly of St. Louis to place its wires, tubes and cables under the streets or alleys of St. Louis.

Respondent further shows unto the court that said ordinance provisions are legal and binding and valid provisions, and such as the City of St. Louis had the right to adopt and enact under Par. 2, of Sec. 26, of Art. 3 of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys and so forth in said city, and such ordinance provisions are legal enactments, notwithstanding any rights which relator now has,

or may heretofore have had, by virtue of any act of the General Assembly of Missouri.

Respondent further shows unto the court that relator has never made application to the Board of Public Improvements for a permit to place its wires, tubes and cables under ground in said city, nor has it complied, in any manner, with any of the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as is asked for by relator in this case.

VII.

Respondent further shows unto the court that on the 2d of March, 1857, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri, by the Act of March 2d, 1857, did not, and did not intend to confer, upon relator, the right to manufacture and vend electricity for lighting purposes.

VIII.

Respondent further shows unto the court that it is likewise true that on the 26th of March, 1868, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri did not and did not intend to confer upon relator by the Act of March 26th, 1868, the right to manufacture and vend electricity for lighting purposes.

Wherefore, having fully made return to the alternative writ herein, respondent asks to be hence dismissed with his costs.

W. C. Marshall,
Attorney for Respondents.

Relator demurred specially to parts of respondent's return and moved to strike out other parts thereof.

The demurrer and motion to strike out are as follows:

In the Supreme Court of Missouri. October Term, 1894.

The State of Missouri *ex relatione* The Laclede Gas Light Company, Relator,
vs.
Michael J. Murphy, Street Commissioner of the City of St. Louis, Respondent.
No. 7434.

Now comes said relator, by its attorneys of record, and demurs specially to the following portions of the return of said respondent to the alternative writ of *mandamus* issued in this behalf, and to each of them, that is to say:

1. To that portion of said return, beginning on line 6 of page 4 thereof, with the words "Respondent further shows unto the court that the said act, approved March 26, 1868," and ending on line 26 of said page 4,, with the words "Was an act reviving and re-enacting the Act of March 2, 1857."

And for grounds of said demurrer relator shows the court:

That the said act, approved March 26, 1868, as by the terms thereof appears, is not, nor purports to be a law reviving or re-enacting any act theretofore passed, and is not, therefore, within the provisions of, nor in conflict with, paragraph 2 of section 1 of article 8 of the Constitution of Missouri, 1865, also,

That even if the said act, approved March 26, 1868, had been a law reviving or re-enacting any act theretofore passed creating any private corporation,

yet relator says that its charter, to-wit, the said Act of March 2d, 1857, was not, nor is within the provisions of paragraph 2 of section 1 of article 8 of the Constitution of Missouri of 1865, because the said Act of March, 2d, 1827, by which, as set forth in relator's petition herein, and admitted in said respondent's return, James M. Hughes and others were, at and from the date of the approval of said act, constituted a body politic and corporate under the style of the Laclede Gas Light Company, did not prescribe any time within which said corporation should be organized or commence the transaction of its business, but on the contrary, to-wit, by section 8 of said act, expressly exempted the said Laclede Gas Light Company and the said charter thereof from the operation of sections 6 and 7 of article first of the general law of the State of Missouri concerning corporations then in force, to-wit, sections 6 and 7 of "An act concerning corporations," approved November 23d, 1855. Wherefore, relator says that from and after the approval of said act, approved March 2, 1857, the said Laclede Gas Light Company, to-wit, this relator, was and continued to be completely vested with all and singular the corporate rights and powers in its said charter mentioned, without any limitation as to the time of its organization or of commencing the transaction of its business, and that said charter was a contract by the State of Missouri with said corporation, in virtue whereof the said charter and the corporate powers therein granted were not subject to alteration, suspension or repeal by any subsequent legislation on the part of the said State.

Wherefore, relator says that the matters averred in said portion of said respondent's return above mentioned constitute no defense to this proceeding.

Relator further demurs:

2. To that portion of said return, on pages 4, 5 and 6 thereof, beginning on page 4, with the words "Respondent further shows unto the court that said Act of March 26th, 1868, is null and void," and ending on line 4 of page 6, with the words—"as if it were an original act or provision."

And for grounds of said demurrer relator shows the court:

That said Act of March 26, 1868, was not, nor by its terms purported to be, an act reviving or re-enacting said Act of March 2, 1857, but was and purported to be an act to amend said Act of March 2, 1857, which act last mentioned was at the date of said amendatory act in full force.

That said amendatory Act of March 26th, 1868, was in no respect in conflict with the provisions of section 25 of article 4 of said Constitution of Missouri, 1865, nor failed in any respect to comply with any provision thereof concerning amendments, such as therein referred to, or which required the setting forth or publishing at length such amendments.

That said Act of March 26th, 1868, did not amend, nor purport to amend, said Act of March 2d, 1857, by providing that any designated words thereof should be struck out, or that designated words should be struck out and others inserted in lieu thereof, and was not in conflict with the provisions of said section 25 of article 4 of said Constitution of Missouri of 1865, or any of them, but

was a valid amendment, to-wit, to the extent of and in accordance with its terms, of the said act, approved March 2d, 1857.

Wherefore, relator says that the matters averred in said portion of respondent's return last above mentioned, constitute no defense to this proceeding.

Relator further demurs:

3. To the following portion of said return, contained in lines 5 to 9, inclusive, on page 6 thereof, to-wit:

"Respondent further shows unto the court that the charter of the relator by the terms of Sec. 9 of the Act of March 2d, 1857, expired on the 2d of March, 1887, and that relator therefore is not entitled to any of the privileges, rights or franchises claimed by it."

Because the averments therein contained constitute no defense to this proceeding; for that the construction therein sought to be placed by respondent upon said Act of March 2d, 1857, is erroneous, and is not consistent with the other provisions of said act as set out in relator's petition and admitted in said respondent's return, nor with other material averments in said return contained.

Because section 6 of said Act of March 2d, 1857, which authorized the City of St. Louis, at the expiration of twenty years from the time of the organization of said company, to-wit, this relator, under said charter, to purchase all the property and effects of said company upon terms therein stated, further provided that if said city should fail so to purchase said property and effects, then said charter

should be and the same was thereby renewed and extended for the period of thirty years after the expiration thereof; and it does not appear, nor is by respondent in said return alleged, that the City of St. Louis has ever purchased or offered to purchase the property and effects of relator or any part thereof as by said section 6 authorized.

Relator further shows the court:

That if the act, approved March 26th, 1868, amending said Act of March 2d, 1857, was and is null and void, as by respondent in said return alleged, then said section 6 of said Act of March 2d, 1857, was not repealed thereby, but remained in force; and since it does not appear, nor is averred in said respondent's return, that the said City of St. Louis ever purchased or offered to purchase the property or effects of relator, the charter of said relator, to-wit, the said Act of March 2d, 1857, and all rights and privileges thereby granted to relator were by the express provisions of said section 6 thereof renewed and extended for thirty years after the expiration of the period mentioned in section 9 of said Act of March 2d, 1857, to-wit, until March 2d, 1917, and are now still in force.

But if, as relator contends, said Act of March 26th, 1868, was and is a valid act, in amendment of said Act of March 2d, 1857, then relator was and still is entitled, under said Act of March 2d, 1857, as so amended, to exercise, have, hold and enjoy, all and singular, the corporate rights, privileges and franchises granted by its said charter as so amended.

Wherefore, relator says that in any event its charter is and remains in full force, and said portion

of said return last above mentioned sets forth no defense to this proceeding, nor any reason why relator should not have the relief sought herein.

Relator further demurs.

4. To that portion of said return beginning with the words "And that it is provided by Article 2, Chap. 15, Rev. Ordinance of the City of St. Louis, 1887," in line 7 of page 7 of said return, and ending with the words "as is asked for by relator in this case."

And for grounds of said demurrer, relator shows the court:

That by the terms of said act to incorporate the Laclede Gas light Company, approved March 2d, 1857, being the original charter of relator, as set forth in said alternative writ and admitted by said respondent's return, special reference being had to section 8 of said act, the said charter was and is a contract between the State of Missouri and said corporation, not subject to alteration, suspension or repeal, except with the consent of said corporation: and that any constitutional provision, law or municipal ordinance adopted or enacted after said date by, or by authority of said State or by any municipality thereof, inconsistent with any right, privilege or franchise granted by said charter to relator, or the effect of which would be to deny to relator any such right, privilege or franchise, or to annex to the full exercise thereof by relator any condition or requirement not prescribed by said charter, would be in contravention of section 15, of article 2, of the Constitution of Missouri, 1875, forbidding the General Assembly to pass any law impairing the obliga-

tion of contracts, and also of section 10, of article 1, of the Constitution of the United States, forbidding any State to pass any such law.

That the provisions of said ordinances of said City of St. Louis in said portion of said return mentioned, if held valid or binding upon relator, would necessarily impair the obligation of the contract between relator and said State of Missouri contained in said charter, by annexing to the exercise by relator of the rights and privileges by said charter granted to it, certain conditions and requirements not prescribed by said charter, and which it does not appear, nor is by respondent averred that the relator has ever consented to or accepted.

Wherefore, relator says that the matters averred in said portion of respondent's return last mentioned do not, nor does any of said matters, constitute any defense to this proceeding, nor any reason why the relief here sought by relator should not be granted.

(Signed) HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Attorneys for said Relator.

In the Supreme Court of Missouri. October Term, 1894.

The State of Missouri *ex relatione* The Laclede Gas Light Company, Relator,
vs.
Michael J. Murphy, Street Commissioner of the City of St. Louis, Respondent.
} No. 7434.

Now comes said relator and moves the court to strike out the following portions of respondent's

return to the alternative writ in this behalf, to-wit:

1. That portion of said return contained in lines 10 to 21 on page 6 thereof, as follows:

"For further and separate return respondent shows unto the court that even conceding all that relator claims with reference to the validity of the Act of March 26th, 1868, and of the Act of March 2d, 1857, nevertheless relator is not entitled to the relief asked for in this case, because respondent says that it has never by any act been granted a franchise to make and vend electricity for any purpose whatever, but that whatever rights, privileges and franchises it ever enjoyed were confined to making and vending gas, gas lights, gas fixtures and any substance or material used as a substitute therefor, and that electricity whether used for lighting or power purposes is not a substance or material, and hence relator has not any right to make or vend the same anywhere."

And for grounds of said motion, relator shows to the court:

That the matters averred in said portion of said return are immaterial and not responsive to the averments in relator's petition or the relief sought therein, but on the contrary respondent attempts thereby to tender a false and immaterial issue in respect of the right alleged and relief sought by relator in and by its petition in this behalf.

Forasmuch as the privilege and right which relator seeks by this proceeding to enforce, as by its said petition appears, is the said right of relator, under its said charter, to establish and lay down in the streets of the City of St. Louis all pipes, fixtures

or other thing properly required in order to carry on the business of lighting the City of St. Louis and the business of making and vending gas, gas lights, gas fixtures and any substance or material which at the date of said charter was or thereafter might be used as a substitute therefor; and especially the right which relator claims under said charter to lay down under said streets in pipes or conduits suitable therefor wires by means of which to transmit currents of electricity for the production of electric light as a substitute for gas light.

Relator further shows to the court that it is matter of common knowledge, and of which relator submits that the court will take judicial notice, that in making or producing gas light, by means of ordinary illuminating gas, the carbon which is a component part or element of such gas, is brought to a condition of incandescence by the application of heat; and it is also matter of common knowledge, of which the court will take judicial notice, that in making or producing electric light, which for years past has been and is now largely used as a substitute for gas light, the carbon which is used for arc lights, in the form of rods or pencils, and for incandescent lamps in the form of a thread or filament, is brought to a condition of incandescence by generating and transmitting through said carbon what is called electricity; the light or illumination produced in either case being, as is commonly known, the result of the incandescent condition of the carbon used and the effect thereof upon the organs of sight.

That as averred in the petition of relator herein,

and not denied in said respondent's return, relator has for a long time past carried on the business of making and vending to the City of St. Louis, under a contract with said city therefor, and to many of the inhabitants thereof, as a substitute for gas light, what is called electric light, that is to say, light radiating from carbon rods or carbon filaments heated to incandescence by means of electricity, as above mentioned, instead of light radiating from particles of incandescent carbon in the flame of burning gas, thereby substituting one form of incandescent carbon for another form thereof, each of said forms of carbon being a substance or material within the meaning of the relator's charter and within the corporate rights and powers thereby conferred on relator. And relator says that in proposing, as in its said petition set forth, to establish and lay down in the streets of St. Louis a system of wires strung or laid in underground pipes or conduits, as a substitute for the overhead wires strung on poles along said streets hitherto used by it, so as by means of said underground wires more conveniently and safely to transmit or convey to such carbon rods or filaments the electric currents which, as admitted by respondent's return, it is necessary to convey by means of wires strung either on poles or in underground conduits in order to make said carbons incandescent, thereby producing electric tight as a substitute for gas light, relator purposes to substitute for the gas pipes and fixtures which formerly were alone used by it in carrying on the business authorized by its charter, pipes or conduits and wires such as properly required for said

purpose, also arc lamps and carbons used therfor and incandescent lamps and carbon filaments which are a necessary part thereof, each and all of which pipes or conduits, wires, arc or incandescent lamps and carbon rods or filaments, respectively, relator avers are substances and materials within the meaning and intent of said charter of relator.

Wherefore, relator says that whether what is called electricity, by means whereof said carbon rods and filaments are rendered incandescent and caused to radiate light as aforesaid, is or is not a substance or material, is an issue wholly foreign and immaterial to the questions arising upon the said alternative writ, that is to say, as to the right of relator under its charter to make and vend electric light as a substitute for gas light, and its right for that purpose to make use of incandescent carbon in the form of rods or filaments as a substitute for incandescent gas, and to use arc and incandescent lamps with carbon rods or filaments as a substitute for gas fixtures, and to that end, in lieu of and as a substitute for under ground gas pipes and gas fixtures and apparatus connected therewith, to establish and lay down in the streets of said City of St. Louis such pipes or conduits as may be properly required for the maintenance of wires for the transmission of electricity: inasmuch as relator avers that the determination of that question or pretended issue would not in any manner assist or enable this court to adjudicate or pass upon any right in this behalf alleged or claimed by relator. And the said portion of said respondent's return should therefore be disregarded and stricken out as immaterial.

2. Also that portion of said respondent's return contained in lines 3 to 6, inclusive, on page 7 thereof, as follows:

"That it is provided by Section 2721 of Art. 5 of Chap. 42, Rev. Stats. 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through the municipal authorities thereof."

And for grounds thereof, relator shows the court—

That the said provision alleged by respondent to be part of Section 2721 of Article 5, Chapter 42, of the Revised Statutes of Missouri, 1889, does not truly or correctly set forth the purport or intent of the statutory provision therein referred to, in this, that the provisions of said Section 2721, by their terms, expressly relate only to telegraph and telephone companies organized under the provisions of said article 5, Chapter 42, of said Revised Statutes of 1889, and do not relate nor purport to relate in any manner to any corporation except telegraph or telephone companies, nor to any such companies except such as shall have been organized under the provisions of said Article 5, of said Chapter 42, of said Revised Statutes.

Wherefore, relator says that said portion last mentioned of said return is irrelevant and immaterial to any question involved in this proceeding and constitutes no defense thereto.

3. Also that portion of said respondent's return contained in lines 18 to 22, inclusive, on page 8 thereof, as follows:

"Respondent shows unto the court that on the

2d of March, 1857, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri, by the Act of March 2d, 1857, did not, and did not intend to confer upon relator the right to manufacture and vend electricity for lighting purposes."

And for grounds of said motion, relator shows the court:

That said portion of said return last mentioned is immaterial and irrelevant to the questions presented by relator's petition and the alternative writ in this behalf, and constitutes no defense to said alternative writ or to the relief sought by relator in this proceeding.

Because it appears from the terms of said Act of March 2d, 1857, that the State of Missouri thereby, to-wit, by the fifth section of said act, expressly granted to relator the corporate right and privilege of making and vending gas, gas lights or gas fixtures, and any substance or material that might then or thereafter be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of said act.

4. Also that portion of said respondent's return contained in lines 23 to 28, inclusive, on page 8 thereof, as follows:

"Respondent further shows unto the court that it is likewise true that on the 26th of March, 1868, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri did not, and did not intend to confer upon relator, by the

Act of March 26, 1868, the right to manufacture and vend electricity for lighting purposes."

And for grounds of said motion, relator shows the court:

That said portion of said return last mentioned is immaterial and irrelevant to the questions presented by relator's petition and the alternative writ in this behalf, and constitutes no defense to said alternative writ or to the relief sought by relator in this proceeding.

Because it appears from the terms of said Act of March 2d, 1857, that the State of Missouri thereby, to-wit, by the fifth section of said act, expressly granted to relator the corporate right and privilege of making and vending gas, gas lights or gas fixtures, and any substance or material that might then or thereafter be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of said act.

And it further appears from the terms of said Act of March 26th, 1868, by which said Act of March 2d, 1857, was amended as set forth in relator's petition, that all the rights, privileges and franchises granted to said relator by said fifth section as said Act of March 2d, 1857, were by said amendatory Act of March 26th, 1868, confirmed to relator, without annexing to any such right, privilege or franchise any condition that such substitute should be only such as was known to art at the date of the approval of said amendatory act.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Attorneys for said Relator.

ISSUES.

The issues thus presented are as follows:

Relator claims to be a body politic by virtue of an Act of the General Assembly of Missouri, approved March 2d, 1857 (Acts 1856-7, p. 598), as amended by an act approved March 3d, 1857 (Acts 1856-7, p. 599), as amended by an act approved March 26th, 1868 (Acts 1868, p. 187).

Analyzed said acts are as follows:

ACT MARCH 2D, 1857.

The first section of the act creates Jas. M. Hughes and seven others a body politic and corporate by the style of "The Laclede Gas Light Company, and by that name they and their successors and assigns shall have perpetual succession, etc."

The second section fixed the capital stock at fifty thousand dollars and authorized it to be increased to two millions.

The third section directs that the affairs of the company shall be managed by a board of not less than five directors, etc.

The fourth section authorized books of subscription for the capital stock to be opened in St. Louis, and upon the sum of fifty thousand dollars being subscribed provides that the company may organize under this charter.

Section 5 of the act is as follows:

"The said company, its successors and assigns shall, within all that portion of the present corporate limits of the City of St. Louis, in St. Louis County, not embraced within the corporate limits of said city, as established by the act entitled 'An act

to incorporate the City of St. Louis,' approved February 8th, 1839 (the corporate limits of the city being by the Act of 1839 bounded as follows: Beginning at a point in the Mississippi river, due east to the southeast corner of St. George in St. Louis County, thence due west to the west line of Second Carondelet avenue; thence north with the west line of said avenue to the north line of Chouteau avenue; thence northwardly in a direct line to the mouth of Stony creek above the present north line of the City of St. Louis; thence due east to the middle of the main channel of the Mississippi river,) *have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may now or hereafter be used as a substitute therefor*, and to that end may establish and lay down, in said portion of said corporate limits, all pipes, fixtures or other thing properly required, in order to do the same, (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

Section six authorized the City of St. Louis and the company to make any contracts that they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. It provides that "the said city shall have the right, at the expiration of twenty years from the time of the organization

of said company, under this charter, to purchase all the property and effects of the same, *paying therefor to the same the value of such property and effects, with twenty per cent. added thereto*, such value to be fixed by two appraisers, one to be chosen by the city and the other by the company, and if they cannot agree then the two thus chosen shall name a third man, and a decision of any two of the three shall be binding; and upon such purchase being made all such property and effects, and all rights and privileges granted to said company, shall immediately pass to and vest in said city. If said city fail so to purchase said property and effects, then this charter shall be, and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof."

Section 7 punishes any person or body corporate who interferes with the privileges granted to said company or exercises like acts or privileges, by a forfeit and fine to said company of one thousand dollars for every such offense, and makes each day's continuance of such offense a new offense.

Section eight exempts the company from the operation of Sections 6, 7, 13, 14, 15, 16, and 20 of Art. 1, of "An act concerning corporations," approved November 23d, 1855. The sections of the Act of November 23d, 1855, here referred to are contained in Chap. 34, Rev. Stats. 1855, pp. 371 to 374, and are as follows:

Sec. 6. "If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from

the date of its incorporation, its corporate powers shall cease."

Sec. 7. "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

Sec. thirteen makes the individual property of the members of the corporation liable to be taken on execution to double the amount of the debt for all debts of the corporation contracted during ownership of such stock.

Sec. fourteen provides for levying the execution upon the stock.

Sec. fifteen gives the creditor the election of suing stockholders jointly or severally.

Sec. eighteen requires annual notices to be printed of the amount of all existing debts of the corporation, etc.

Sec. twenty prohibits the contracting of debts to an amount exceeding the capital stock.

Sec. nine of the Act of March 2d, 1857, is as follows:

"This act shall take effect from its passage, and shall continue in force for thirty years."

Thus the act by Sec. 1, gives the right to have "*perpetual succession*," and by Sec. 5, to have and enjoy "*during the continuance of this act*" the privileges conferred by the act, and, by Sec. 6, authorized the city to purchase the property at any time within twenty years, and upon failure so to do extends the life of the company "for the further period of thirty years after the expiration hereof."

and *Sec. 9 limits the duration of the corporation to thirty years from the passage of the act.*

The Act of March 3d, 1857, amended the Act of March 2d, 1857, by providing, in Sec. 1 thereof, that the words, "*sole and exclusive*," in the fifth section of the Act of March 2d, be stricken out; and by providing in Sec. 2, of the amendatory act, that in case the city purchased the property as provided in Sec. 6 of the Act of March 2d, it should not be required to pay any more than the *appraised value* of the property and effects to the Laclede Gas Light Company, *and struck out the additional percentage of twenty per cent. provided for in said Sec. 6.*

The Act of March 26th, 1868, is entitled: "An act to amend an act to incorporate the Laclede Gas Light Company, approved March 2d, 1857," and provides as follows:

Section one provides that: "The said Laclede Gas Light Company shall and may, within the corporate limits of the City of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy *forever* all the rights, privileges and franchises GRANTED TO IT BY THE FIFTH SECTION OF THE ACT TO WHICH THIS ACT IS AMENDATORY, and may, at any time, lease, sell, or dispose of any portion of said rights, privileges and franchises, to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits aforesaid."

Sec. 2 authorizes *the capital stock of the company to be increased, from time to time, to such amount as may be necessary to cary on its business.*

Section 3 provides that nothing in said act shall

be construed as affecting the vested rights of the St. Louis Gas Light Company, "AND THE SIXTH SECTION OF THE SAID ACT, TO WHICH THIS ACT IS AMENDATORY IS HEREBY REPEALED."

Sec. 4 is as follows:

"An act entitled 'An act supplementary to and amendatory of an act entitled an act to incorporate the Laclede Gas Light Company, approved March 3d, 1857,' is hereby repealed."

Sec. 5 provides that the act shall take effect from its passage.

If all of these acts are legal and constitutional then the charter of the Laclede Gas Light Company will be as follows:

Sec. 1. James M. Hughes, Edward Bredell, Robert Holmes, John C. Rust, Charles Gibson, Samuel H. Gardiner, Henry A. Clover and Archibald Gamble, be, and they are, created and constituted a body politic and corporate, by the style of the Laclede Gas Light Company and by that name, they and their successors and asssigns *shall have perpetual succession*, may contract and be contracted with, sue and be sued, and may also hold and convey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purposes of said corporation, and the prosecution of its legitimate business.

Sec. 2. The capital stock of said company shall be fifty thousand dollars and may be increased, from time to time, to such amount as may be necessary to carry on its business.

Sec. 3. The affairs of said company shall be conducted by a board of not less than five directors,

and such officers and agents as they may deem necessary; said directors to be chosen annually, by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their office for one year, and until their successors are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations for the transaction of the business of said company, and under the direction of the stockholders, may have absolute power over all property and effects of said company. They may also fill vacancies in their board until the next regular election.

Sec. 4. The said corporators, or a majority of them, may, at any time, open books, in the City of St. Louis, for subscription to the capital stock of said company, and upon the sum of fifty thousand dollars being subscribed may organize said company under this charter.

Sec 5. The said Laclede Gas Light Company shall and may, within the corporate limits of the City of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy forever the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down, in said portion of said corporate limits, all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible); and shall also have all other

powers necessary to execute and carry out the privileges and powers hereby granted to said company; and may at any time, sell, lease, or dispose of any portion of said rights, privileges and franchises to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits aforesaid.

Sec. 6. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company.

Sec. 7. Any person or body corporate who shall, within the corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to said company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be, a new offense, under this section.

Sec. 8. The said company and this act is hereby exempted from the operation of Sections 6, 7, 13, 14, 15, 18 and 20, of Art. 1 of an act entitled: "An act concerning corporations," approved November 23d, 1855.

Sec. 9. This act shall take effect from its passage and shall continue in force for thirty years.

Thus by section 1 the Laclede Gas Light Company, their successors and assigns, are given "*perpetual succession.*"

By section 5 said company is given the sole and exclusive right to exercise, have, hold and enjoy "*forever*" the privilege and right of lighting the city, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may be

now or hereafter used as a substitute therefor, subject, however, to the vested rights of the St. Louis Gas Light Company.

By section 9 it is provided that the act "*shall continue in force for thirty years.*"

Relator's Claims.

Relator, after setting forth the acts hereinbefore referred to, states: That on the 28th of February, 1873, a certain agreement known as the "Tripartite Agreement," was made between the City of St. Louis, the St. Louis Gas Light Company and the Laclede Gas Light Company, by which, for certain valuable considerations therein set forth, the Laclede Gas Light Company abandoned and surrendered any and all exclusive rights and all claims or pretense of claims of sole or exclusive privileges or right whatsoever under its charter; that relator has been engaged for a long time in the lighting business, both by gas and electricity, and under a contract with the City of St. Louis it is now lighting a part of the streets and alleys by electricity, and is also furnishing light by means of gas or electricity to many thousand private consumers; that it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as genating and distributing electric currents, the former being distributed by means of a system of pipes laid under ground along the streets of the City of St. Louis, said city never having objected to its so doing, and the latter being distributed by overhead wires strung upon poles along the streets and alleys of the city, and, transmitted in this way, such electric-

ity is, if accidentally diverted, dangerous to human life and property; that in order to avoid such inconvenience and danger to the public, relator had made arrangements to lay its wires under ground according to plans prepared by it; that respondent, as street commissioner of the City of St. Louis, under the charter of said city, has control of the streets and alleys of the city; that relator, after giving notice of intention so to do, on the 30th of October, 1894, began making an excavation at a point on Broadway, near the corner of Mound street, for the purpose of placing such electric wires under ground, when it was stopped by order of respondent, who notified relator he would not permit it to make any excavation for any purpose whatever, without a permit previously obtained for that purpose; that Sec. 568, Art. 1, Chap. 15, Rev. Ord. 1887, of the city, provides that "no person shall make or cause to be made any excavation on any public street, highway, or alleys without permission of the street commissioner so to do, excepting public work done under the authority of the water or sewer commissioner, who, at the time of ordering any such excavation, shall notify the street commissioner of the same;" that thereafter relator applied to the street commissioner for a permit to lay its wires underground for the purpose aforesaid, but the street commissioner refused to grant the permit.

RESPONDENT'S CLAIMS.

The return of respondent sets up the following defenses, to-wit:

First. That the Act of March 26th, 1868, is un-

constitutional, null and void, and is in conflict with Par. 2, of Sec. 1, of Art. 8 of the Constitution of Missouri, 1865, which provides as follows: "No law shall be passed reviving or re-enacting any act heretofore passed, creating any private corporation, where such corporation shall not have been organized and commenced the transaction of its business within one year from the time such act took effect, or within such other time as may have been prescribed in such act for such organization and the commencement of business;" that the Laclede Gas Light Company did not organize and commence business within one year after March 2d, 1857, but, on the contrary, did not commence business until the year 1873.

Second. That the Act of March 26th, 1868, is null and void and in conflict with Sec. 25 of Art. 4 of the Constitution of Missouri, 1865, which section is as follows: "No act shall be revived or re-enacted by mere reference to the title thereof; nor shall any act be amended by providing that designated words therein shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every such case the act revived or renewed, or the act or part of act amended shall be set forth and published at length as if it were an original act or provision."

Respondent showing unto the court in this regard, that the Act of March 26th, 1868, is an act reviving and re-enacting the Act of March 2d, 1857, and that it does not set forth and publish at large the Act of 1857 as revived and re-enacted by the Act of 1868, and that in order to ascertain and de-

termine the meaning of the Act of 1868, it is necessary to compare it with the Act of 1857, and without such comparison it is wholly unintelligible; that the Act of 1868 refers to the rights, privileges and franchises granted by Sec. 5 of the act to which it is amendatory, that is, the Act of March 2d, 1857, and hence it is necessary to refer to the fifth section of the Act of 1857 to determine what rights, privileges and franchises were granted by that section, and that it is, therefore, null and void because it does not set forth and publish at length as if it were an original act or provision, what rights, privileges and franchises were intended to be revived or re-enacted; and that the Act of 1868 further violates said constitutional provision, in that, by Sec. 3 thereof, it attempts to repeal the sixth section of the Act of 1857, without setting forth and publishing the same at length; and that it further violates said constitutional provision, in that it strikes out designated words of the Act of 1857, and inserts others in lieu thereof, to-wit; it strikes out from the fifth section of the Act of 1857 the words "*during the continuance of this act*," and substitutes therefor the word, "*forever*," without setting forth and publishing at length the said amendment as if it were an original act or provision.

Third. The respondent contends that the Act of 1857, whether considered alone or in reference to the Act of 1868, limited the duration of the relator to a term of thirty years, and hence relator's corporate existence ended on the 2d of March, 1887.

Fourth. Respondent contends that even conceding the validity of the Acts of 1857 and 1868, never-

theless relator is not entitled to the relief asked, because, *it has never been granted the right to manufacture, vend or distribute electricity for any purpose whatever, and that electricity is not a substance or material;* that relator has already made excavations in the streets of St. Louis, and, particularly, along the portions thereof for which a permit was asked and refused in this case, and has placed therein pipes and other fixtures for transmitting and vending and supplying gas to consumers in the City of St. Louis.

Fifth. Respondent further contends that by the provisions of Sec. 2721 of Art. 5, Chap. 42, Rev. Stats. 1889, no company is allowed to place its wires or other fixtures under ground in any city, unless it shall first obtain the consent from the city, through the municipal authorities thereof, and that relator has never obtained such consent from the city.

Sixth. Respondent further contends that it is provided by Art. 2, Chapter 15, Rev. Ord. of the City of St. Louis, 1887, as the same has been amended by Ordinance No. 16,894, that no wires, tubes or cables conveying electricity for the production of light, heat or power, shall be placed along, across or under any of the streets, alleys or public places of the city, by any person, corporation or association, who had not previous to the passage of said ordinance accepted and complied with ordinance No. 12,723, unless such person, etc., shall have procured the consent of the city so to do by an ordinance passed by the Municipal Assembly, and then only on condition that such person, etc., before placing its wires, tubes and cables underground, shall

file in the office of the Board of Public Improvements, an application therefor, stating, in detail, the places in the streets to be occupied, the manner of insulating, securing and supporting the wires, tubes, or cables, and procuring from said board a permit therefor, and that relator has never been granted such right by ordinance, nor been granted a permit by said board; that Par. 2 of Sec. 26, Art. 3, of the charter of the City of St. Louis, confers the power upon the Municipal Assembly to pass such ordinance regulations.

Seventh. Respondent further contends that lighting by electricity was wholly unknown to art on the 2d of March, 1857, and that by the passage of the act of that date, the General Assembly of Missouri did not, and did not intend to confer upon relator the right to manufacture and vend electricity for lighting purposes.

Eighth. Respondent further contends that it is likewise true that on the 26th of March, 1868, lighting by electricity was wholly unknown to art, and that the General Assembly did not by the act of that date intend to, nor did it, confer upon relator the right to manufacture and vend electricity for lighting purposes.

Relator demurs to the first, second, third and sixth defenses made by respondent, and moves to strike out the fourth, fifth, seventh and eighth defenses made by respondent.

Thereupon the Supreme Court of Missouri, sitting *in banc*, heard the issues so framed and presented,

and after duly considering the same rendered the following decision:

In the Supreme Court of Missouri.

In Banc. April Term, 1895.

State *ex rel.* The Laclede Gas Light Company, Relator,
vs.
Michael J. Murphy, Street Commissioner of St Louis, Respondent.

On the petition of relator an alternative writ of *mandamus* was issued by this court, directed to respondent Murphy as street commissioner of the City of St. Louis, commanding him to show cause why he should not be required to issue a permit to relator to make an excavation along the east side of Broadway as near the curb as practicable, and extending from Mound street to Olive street in the City of St. Louis, in so far as such excavation should be necessary for the purpose of laying relator's electric wires under ground.

By its petition relator represents that it is a corporation created under an act of the legislature of the State, approved March 2d, 1857, and a supplementary and amendatory act approved March 3d, 1857, and an amendatory act approved March 26th, 1868.

These acts are set out in full in the petition. The first, approved March 2d, 1857, is entitled "An act to incorporate the Laclede Gas Light Company."

The first section of the act creates James M. Hughes and seven others a body politic and corporate by the style of "The Laclede Gas Light

Company, and by that name they and their successors and assigns are given perpetual succession, etc."

The second section fixed the capital stock at fifty thousand dollars and authorized it to be increased to two millions.

The third section directs that the affairs of the company shall be managed by a board of not less than five directors, etc.

The fourth section authorized books of subscription for the capital stock to be opened in St. Louis, and upon the sum of fifty thousand dollars being subscribed, provides that the company may organize under this charter.

Section five provides that said company, its successors and assigns, should, within the corporate limits of said city, not embraced within the limits as established by Act of 1839, "have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may now or hereafter be used as a substitute therefor, and to that end may establish and lay down, in said portion of said corporate limits, all pipes, fixtures or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

Section six authorized the City of St. Louis and the company to make any contracts that they may

deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. It provides that "the said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent. added thereto, and the manner of ascertaining the value by appraisers is provided. Said section has this further provision: "If said city so fail to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration thereof."

Section seven punishes any person or body corporate who interferes with the privileges granted to said company or exercises like acts or privileges, by a forfeit and fine to said company of one thousand dollars for every such offense, and makes each day's continuance of such offense a new offense.

Section eight exempts the company from the operation of sections 6, 7, 13, 14, 15, 16 and 20 of Art. 1 of "An act concerning corporations," approved November 23d, 1855. The sections of the Act of November 23d, 1855, here referred to are contained in Chap. 34, Rev. Stats. 1855, pp. 371 to 374.

Section nine is as follows: "This act shall take effect from its passage, and shall continue in force for thirty years."

The Act of March 3d, 1857, is as follows:

"An act supplementary and amendatory of an

act entitled 'An act to incorporate the Laclede Gas Light Company.'

Be it enacted by the General Assembly of the State of Missouri, as follows:

Sec. 1. The act to which this act is amendatory is hereby amended so that the words 'sole and exclusive' in the fifth section of the act are stricken out.

Sec. 2. The City of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage."

The Act of March 26, 1868, was entitled "An act to amend an act to incorporate the Laclede Gas Light Company," approved March 2, 1857, and is as follows:

Section 1. The Laclede Gas Light Company shall and may, within the corporate limits of the City of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

Sec. 2. The capital stock of said company may

be increased from time to time to such amount as may be necessary to carry on its business.

Sec. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company; and the sixth section of said act to which this act is amendatory, is hereby repealed.

Sec. 4. An act entitled "An act supplementary to and amendatory of an act entitled 'An act to incorporate the Laclede Gas Light Company,'" approved March 3, 1857, is hereby repealed.

Sec. 5. This act shall take effect from its passage.

Relator represents further that under the charter rights granted by these general acts it is, and, for a long time has been, engaged in the lighting business, both by gas and electricity; that under a contract with the City of St. Louis, it is lighting a part of its public streets by electricity; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter, it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of the City of St. Louis as it was at all times authorized to do by its said charter, nor has the City of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity rela-

tor has hitherto used overhead wires strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof, for the distribution of electricity as well to furnish light to private consumers as for the fulfillment by relator of its said contract with said City of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which, if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of disturbing electric currents, and in order to provide more effective and proper service, relator has made arrangements to lay its wires under ground along and under the street of said city according to approved and practicable plans and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

Relator states further that respondent was street commissioner of said city, and under its charter and ordinances had supervision and control of its streets and the enforcement of ordinances relating thereto. That after notice to said commissioner of its intention to do so, on the 30th day of October, 1894, the relator commenced excavating on said streets for the purpose of laying its electric wires under ground, but was prevented from so doing by respondent acting in his capacity of street commissioner. That

thereupon relator applied to respondent for a permit to make such excavation for such purposes, which was denied him.

Respondent made return to said writ and by affirmative averments put in issue the rights claimed by relator, and set up the provisions of certain city ordinances regulating the use of electric wires on the streets of the city and averred a non-compliance with the requirements of such ordinances. By demurrer to parts of the return and motion to strike out other parts the following issues of law were fairly framed:

First. Is the Act of March 26th, 1868, unconstitutional as being in conflict with section 2, article 8 of the Constitution of Missouri of 1865?

Second. Is said act void as being in conflict with section 25 of article 4 of said constitution?

Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the Act of March 2d, 1857.

Fourth. Do the powers granted relator include the right to manufacture, sell or distribute electricity for lighting purposes?

Fifth. Has relator the right, under its charter, to place its wires under ground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city?

I. The object to be accomplished by the writ is to require Murphy, as street commissioner, of the City of St. Louis, to issue to relator a permit to make such excavation on one of the public streets of the city as may be necessary for the purpose of

laying its electric wires under ground. The constitutionality of the acts under which relator claims corporate existence, is put in issue by the answer of respondent and demurrer thereto. Respondent also charged that though the acts of incorporation were valid, in the first instance, the life of the corporation itself has expired by limitation of its existence as fixed by the charter and general laws of the State.

The city is not made a party to this proceeding and we do not deem it necessarry in this case to pass upon any questions that do not directly concern the duties of the street commissioner. We will not therefore consider, or express an opinion upon, any question involving the right of relator to exercise the rights, or enjoy the franchises which appear to have been granted under the acts of the General Assembly mentioned in the statement.

For the purpose of discussing the other questions involved we will then assume, without deciding, or intimating an opinion, that relator is an existing corporation possessing all the powers, rights and privileges its charter purports to confer upon it.

It is insisted by relator that under its charter it acquired from the State a vested right to the use of the streets of the City of St. Louis under which to lay its pipes for the transmission of gas or any other "substance or material" that might thereafter be adopted for illuminating purposes, and that such right was beyond the control of the municipal authorities; that electricity is a substance and material within the meaning of the charter, and therefore it has a vested right to lay its wires beneath the sur-

face of the streets for the purpose of conducting electricity through the city for illuminating purposes, and that this right cannot be interfered with unreasonably by the city.

With the views we take of this question we do not think it necessary to inquire whether the right to use electricity for making light was included under the terms "substance or material" as used in the charter. It appears that relator has, for a number of years, under contracts with the city, been lighting its streets by electricity conducted by wires strung above the surface of the streets, and other questions besides the abstract right to do so would be involved in such injury. We will therefore confine our inquiry to the question whether relator has a vested right to place its electric wires under the surface of the streets without the assent of the municipal authorities thereof and without compliance with valid ordinances of the city.

Generally speaking, it is true, the legislature has supreme control of the streets of the cities. It is also true that it may, and generally does, delegate to municipal corporations such measure thereof as it deems best. The control thus delegated may be exercised by the municipal authorities.

Subsequent to the Act of 1868, under authority of the constitution of 1875, the City of St. Louis adopted a charter whereby the State delegated to it the power to regulate the use of its streets, and the power to pass all ordinances, not inconsistent with the provisions of the charter, or the laws of the State, as may be expedient, in maintaining the

peace, good government, health and welfare of the city, its trade, commerce and manufactures.

In pursuance of these powers the city enacted certain ordinances regulating and restricting the use of electric wires in the city and requiring the assent of the Board of Public Improvement in respect to the manner in which electric wires, tubes and cables, should be secured or supported and insulated. It is charged in the return and admitted by the demurrer that relator had never complied with the requirement of this ordinance. Relator insists that the provisions of the ordinance cannot apply to rights secured to it by the State long prior to the date of the charter.

It is the well settled present policy of the law of this State to delegate to municipal corporations not only general police powers, but the control of their streets in respect to the use thereof for public purposes other than that of ordinary travel by pedestrians and private vehicles. Thus the constitution prohibits the legislature from granting the right to construct and operate street railways within any town or village without first acquiring the consent of the local authorities having control of the streets. (Sec. 20 Art. 12, Const. of Mo.)

Again, the statute requires telegraph and telephone companies to obtain the consent of the city, through its municipal authorities, before they can exercise their right to lay their wires, and other fixtures, under ground in any of its streets. (R. S. 1889, Sec. 2721.)

Electric wires when charged are recognized as being dangerous to life and property, and their use

is therefore subject to police regulations. (W. U. Telegraph Company v. Philadelphia, 21 Am. & Eng. Corp. Cas. 40 and note; Dill. Munic. Corp., Sec. 698.)

The State cannot limit its exercise of the police power by contract or in any other way. It was said by Chief Justice Waite: "All agree that the legislature cannot bargain away the police power of the State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. (Stone v. Mississippi, 101 U. S. 817. See Boyd v. Alabama, 94 U. S. 645; Metropolitan Bd. v. Barrie, 34 N. Y. 657; Railroad v. Mayor of Baltimore, 77 Maryland, 381.)

Dillon says: "The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not to unreasonably injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally." (Dill. Munic. Corp.)

The grant by the State to relator, though construed to include the right to use electricity for illuminating purposes in respect to such right, was taken subject to reasonable regulations as to its use,

and the power to regulate has been delegated to the City of St. Louis.

Under its general police power the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires.

II. But this is not the only reason why the city should not, under its special power to regulate the use of its streets and under its general police power, have the right to supervise and regulate the manner in which electric wires of relator and all others should be placed and used in the public streets.

The art of producing light by electricity was wholly unknown to science at the time the franchise was granted to relator. The legislature, having no knowledge of the use that would be made of the streets in applying new discoveries in producing light, could not have intended to grant rights and powers inconsistent with their ordinary use. It would be most unwarrantable to imply, not only that relator had the right under the general words used in the act of incorporation to use electricity for lighting purposes, but that it also had the right to adopt its own methods for exercising that power, regardless of the paramount rights of the public to the use of the streets.

The powers delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or at least before relator adopted it, and the art should be exercised, if at all, under the powers thus in force when it was brought into use.

The following declaration of law was quoted approvingly in Carroll v. Campbell (108 Mo. 559): "It is a well settled rule of construction of grants by the legislature to corporations whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." (Fanning v. Gregoire, 16 How. 534.)

There seems to me much stronger reason for applying this rule to the manner in which a right conferred shall be exercised when more than one method is open, and when the rights and safety of the public are more or less affected by either. In such case where the public streets of a city, which are under municipal control, are to be used, it seems too plain for argument that the city should have the right to direct the manner in which the use should be exercised.

Again, it is a matter of common knowledge that electricity is used for the purposes of transmitting sound by telephone, for transmitting messages by telegraph, for generating light, and for producing power. These uses are regarded as public and have become necessary to the business and convenience of the country, and particularly that transacted in large cities. Overhead electric wires in some streets are numerous. These contribute very materially to public convenience and private business, but when not properly supervised

and regulated endanger the lives and property of the public. If used, as they generally are, in the public streets, public safety requires that they should be under police regulation and municipal control.

It is a matter also of public notoriety that the question is now being considered whether it would not be necessary, in the interest of public safety, as well as convenience, that these wires should be placed under ground, so as thereby to leave the streets safe and unobstructed

As a police regulation, we have no doubt, the municipal authorities would have the right to require this to be done in case no vested rights were infringed. Many corporations and companies doubtless now use electric wires for the various purposes above mentioned. It cannot be said, not having the various charters before us, that one of these possesses rights superior to those of any others. To accommodate them all, to prevent monopolies, and to regulate the use of the streets, it seems absolutely necessary that the municipal authorities should have the right to direct the manner in which wire shall be placed under ground. Without such regulation, relator, or any other corporation using electric wires, could place them under ground in such a manner as to practically exclude all others. Moreover, relator, as one of its important franchises, asserts the power to sell, lease or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits named. Thus under its charter, al-

lowing the rights herein claimed, it could practically control the use of the streets in respect to laying electric wires under ground, and exclude the city from one of the most important of its municipal powers. The legislatare could never have contemplated such a result.

By giving the city the right to regulate the laying of electric wires under ground, relator is deprived of no vested right. If its charter gives it the right to use electricity for lighting purposes it can do so, as we understand from the petition it has been doing, in the method now in use in said city. If the city should determine that public safety requires these wires to be placed under ground, and provides the manner in which it shall be done, and relator believes its rights are thereby infringed, it will then be time enough to complain.

As the case is now presented we must hold that the city, under its power to regulate the use of streets, and under its general police power, has the right to require a compliance with regulations which either wholly prohibit relator from laying its wires under the streets or which regulate the manner in which it may be done.

Respondent, under his official duties as street commissioner, properly refused to grant the permit demanded, unless relator first complied with the requirements of the valid ordinances then in force.

Peremptory writ denied.

All the judges concur.

G. B. MACFARLANE,
Judge.

Afterwards, on the 21st of June, 1895, plaintiff in error filed the following motion to modify the judgment of the Supreme Court aforesaid:

MOTION TO MODIFY.

IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1895.

State of Missouri at the Relation of the Laclede Gas Light Company, Relator,	No. 7434.
vs.	
Michael J. Murphy, Street Commissioner of the City of St. Louis, Respondent.	Court *in Banc.*

Now comes relator and moves the court to modify the judgment heretofore entered in this cause, to-wit, on the 18th day of June, 1895, so as to allow relator to plead or to traverse respondent's return in accordance with the usual practice in cases of *mandamus*, and as provided by the statutes of Missouri applicable thereto.

And for grounds of this motion relator says that the argument and decision were upon a demurrer to parts of the return and a motion to strike out other parts thereof; that the effect of the decision rendered by this court on the 18th day of June, 1895, is to overrule the demurrer as well as the motion and to leave to relator the alternative right of letting judgment go upon the pleadings as they stand or to plead over; but relator desires to plead over before a final judgment is entered, for the reason that relator wishes to set out in full the city ordinances referred to in respondent's return, which have not

been set out in the pleadings as they now stand, and also for the reason that by the demurrer relator constructively admits certain allegations of fact which it desires to deny, so that if relator should determine to sue out a writ of error from the United States Supreme Court it may have the benefit of a complete and proper record in the cause.

Because, reference being had to the state of the pleadings in said cause, and to the statutes in such case provided, relator respectfully suggests to the court that the said final judgment rendered on the 18th day of June was prematurely and improvidently rendered.

THE LACLEDE GAS LIGHT COMPANY,
Relator,
BY HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Its Attorneys.

Afterwards, on the 25th of June, 1895, the following order was made in the case:

STATE EX REL. LACLEDE GAS LIGHT COMPANY,
Relator,
vs.
M. J. MURPHY, STREET COMMISSIONER, ETC.,
Respondent.

Now at this day, the court having fully considered and understood the motion heretofore filed to modify the judgment heretofore entered herein and to allow the relator to plead to the return herein, doth order that the judgment entered herein on the

18th day of June, 1895, be, and the same is hereby, set aside; that the demurrer to the return and motion to strike out parts thereof are overruled, and that leave is granted relator to plead to the return within five days from June 25th, 1895, and this cause is continued.

Thereafter, on the 28th of June, 1895, relator pleaded to the return as follows:

IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1895.

State ex rel. Laclede Gas Light Company, Relator,
vs.
M. J. Murphy, Street Commissioner, Respondent.
} No. 7434.

Now comes said relator, by its attorney of record, and, by leave of court first obtained therefor, for its plea to the return of said respondent in the above entitled cause, says:

That it, said relator, is advised, and therefore avers, that the said act approved March 26, 1868, is not unconstitutional, null, or void, and is not in conflict with any provision contained in article VIII of the Constitution of Missouri, 1865.

Relator avers that said Act of March 26, 1868, was and is a valid amendment of the act approved March 2, 1857, mentioned in said respondent's return, by which relator was incorporated, and in virtue of its said charter as amended by said Act of March 26, 1868, relator is vested with and entitled

to hold and enjoy all the corporate franchises, rights, and powers thereby granted.

Relator further shows the court that by section 8 of said Act of March 2, 1857, it was provided that the said Laclede Gas Light Company and the said act incorporating the same were and should be exempted from the operation of sections (6) six, (7) seven, (13) thirteen, (14) fourteen, (15) fifteen, (18) eighteen, and (20) twenty of article I of the act entitled "An act concerning corporations," approved November 23, 1855.

Relator states that section 6 of said Act of November 23, 1855, was in the words and figures following, to-wit:

"Section 6. If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation its corporate powers shall cease."

And section 7 of said Act of November 23, 1855, was in the words and figures following, to-wit:

"Section 7. The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to suspension, alteration and repeal in the discretion of the legislature."

Relator is advised and avers that being so exempted, to-wit: by section 8 of said Act of November 23, 1855, said corporation was not required to organize nor to commence business within one year from the date of its incorporation, nor was any time prescribed in its charter, to-wit: said Act of March 2, 1857, or in said amendatory act of March 26, 1868, for such organization and commencement

of business; and relator further shows the court that by reason of the provision in section 8 of said Act of March 2, 1857, also exempting said corporation from the operation of said section 7 of said Act of November 23. 1855, relator's said charter became and was a contract between the State of Missouri and the said corporation, which was not nor is subject to alteration, suspension, or repeal by said State of Missouri or by any legislative act or provision of the constitution thereof subsequently adopted except with the consent of said corporation, and that in virtue of the provisions contained in its said charter, to-wit, said Act of March 2, 1857, and especially in sections 1 and 4 thereof, the corporators and stockholders of said corporation had the right under said charter to organize said corporation and to commence the transaction of its business at any time after the said Act of March 2, 1857, took effect, without reference to the provisions of said Act of November 23, 1855, and without reference to any act of the General Assembly or any provision of the constitution of said State which might thereafter be enacted or adopted. Relator further avers that prior to the passage of said Act of March 2, 1857, the St. Louis Gas Light Company was incorporated by an act of the General Assembly of the State of Missouri, approved February 4, 1837, entitled "An act to incorporate the St. Louis Gas Light Company," and that said act was amended by an act of the General Assembly, approved February 11, 1839, entitled "An act to amend the charter of the St. Louis Gas Light Company."

That by the charter of said St. Louis Gas Light

Company as amended said company had the sole and exclusive privilege and right of vending gas lights in the City of St. Louis and its suburbs for a period of twenty-five years from and after the first day of January, 1840, and in the event that the City of St. Louis did not resolve to purchase its property for a further period of twenty-five years or until the first of January, 1890.

That on said 2d day of March, 1857, and for many years thereafter and until the year 1873 said charter of the St. Louis Gas Light Company was in full force and effect, and relator was thereby precluded from selling gas and gas light in said city, without the consent of said St. Louis Gas Light Company, which consent was not obtained until the year 1873, and therefore relator did not begin to manufacture and sell gas until said year 1873.

Wherefore relator says that the several averments in said respondent's return contained in respect of the time when, as alleged, it, said relator, organized as a corporation and in respect of the time when it commenced the transaction of business constitute no defense to this proceeding.

Relator denies that it, said relator, did not organize as a corporation within one year from the time when said Act of March 2d, 1857, took effect. On the contrary relator avers that within one year from the time said Act of March 2d, 1857, took effect and during the year 1857 the persons named as corporators in said act held a meeting in the City of St. Louis, Missouri, for the purpose of accepting said charter and organizing said company under said act; that all the corporators named in said act were

present at said meeting, and the said corporators then and there, to-wit, in said City of St. Louis, did accept said charter and open books for subscriptions to the capital stock of said company and the sum of ($50,000) fifty thousand dollars was then and there, to-wit, by said corporators and others, subscribed for the stock of said corporation, being the entire amount of the capital stock of said corporation authorized by said act, and the said subscribers and stockholders did thereupon, to-wit, at said meeting, organize said company by electing five directors of said corporation from among said stockholders thereof; also electing a president and secretary of said corporation from among said directors; and relator denies that the said corporation did not commence business until the year 1873, and, on the contrary, avers that it commenced business long before the year 1873.

Relator further avers that said Act of March 26th, 1868, is not null or void nor is in conflict with any provision contained in article 4, section 25, of the constitution of Missouri, 1865, as in said return alleged; that said Act of March 26th, 1868, is not an act reviving an Act of March 2d, 1857, nor is an act re-enacting said Act of March 2d, 1857, nor does said act of March 26th, 1868, revive or re-enact or purport to revive or re-enact said Act of March 2d, 1857, by mere reference to the title thereof, nor does said Act of March 26th, 1868, amend or purport to amend said Act of March 2d, 1857, by providing that said designated words thereof shall be struck out or that designated words shall be struck out and others inserted in lieu thereof.

Wherefore relator says that the several averments in said respondent's return setting forth the grounds upon which, as alleged, the said Act of March 26, 1868, violates section 25 of article IV of the Constitution of Missouri, 1865, and is therefore null and void, are and each of them is immaterial and irrelevant and constitutes no defense to this proceeding, and denies each and every one thereof.

Relator denies that by the terms of section 9 of the said Act of March 2, 1857, the charter of relator expired on the 2d of March, 1887, as in said return alleged; and relator avers that although, as hereinbefore stated, the said Laclede Gas Light Company was duly organized as a corporation in and during the year 1857 in pursuance of the provisions of said Act of March 2, 1857, the said City of St. Louis did not at the expiration of twenty years from the time of the organization of said company nor at any time purchase or offer to purchase the property and effects of said company or any part thereof.

Relator is advised and avers that even if the averment in respondent's return, to-wit, that electricity is not a substance or material, were true, which relator denies, said averment is irrelevant and immaterial and constitutes no defense to this proceeding, and further shows to the court—

That the object for which relator was incorporated, as set forth in said Act of March 2, 1857, and referred to in said Act of March 26, 1868, amendatory thereof, was to carry on the business of lighting the City of St. Louis, as well the public streets and alleys of said city as the private and public buildings thereof; that by said charter was granted to relator

the right and privilege of lighting the said city and of making and vending gas, gas lights, gas fixtures, and any substance or material that might at the date of said charter, to-wit, on March 2, 1857, or at any time thereafter, be used as a substitute therefor, and to that end relator was expressly empowered to establish and lay down in any part of the corporate limits of said city as then or thereafter established, all pipes, fixtures, or other thing properly required to do the same; the same to be done with as much dispatch and as little inconvenience to the public as possible.

That for the purpose of lighting a city or to illuminate any space therein, whether a public street or alley or a building or any portion thereof, it is necessary to produce artificial light in the space to be illuminated; that artificial light is produced by making incandescent—that is to say, by bringing to a condition of white heat, in which it gives out light—any substance or material capable of being so used; that in order to light said city as aforesaid relator was expressly authorized by its charter to make and vend not only illuminating gas, but any substance or material which might then or thereafter be used as a substitute therefor, and to that end to establish and lay down at any point within the corporate limits of said city all pipes, fixtures, or other thing properly required to do the same; that illuminating gas is a highly inflammable compound of carbon and hydrogen, chemically combined in certain fixed proportions; that in order to use said gas for illuminating purposes it must be set on fire, which decomposes said gas, setting free the

carbon therein in the form of fine particles and rendering said carbon particles incandescent, which produces what is called gas light.

That light may also be produced from carbon by means of electricity, to-wit: by using carbon not compounded with any other element, in the form of rods or filaments, which may be and are brought to a condition of incandescence by transmitting into or through said carbon rods or filaments what is called electricity by means of apparatus suitable therefor, the result being that the carbon thus rendered incandescent gives out what is called electric light, which has greater illuminating power than gas light and is commonly used as a substitute therefor, as well for the illumination of public streets and places as of public and private buildings, in many cities throughout the United States.

That the right and privilege of lighting the City of St. Louis as aforesaid granted by its charter to relator includes the production of light in the manner last above described, to-wit, by making carbon or any other suitable substance incandescent by means of electricity, equally with the right or privilege of making and using carbon in its compound form of illuminating gas and by making it incandescent in the manner above stated, to-wit, by the application of heat, carbon being in either case the substance or material which is made incandescent, thereby producing light, though when illuminating gas is used the carbon is in a compound form, the particles thereof being set free and made incandescent by heat, as above stated, producing what is called gas light while in the production of electric

light pure carbon is used as a substitute for gas and is made incandescent by the application of electricity.

It is true, as in said return alleged, that relator, therein exercising its corporate franchise of lighting the City of St Louis and of vending gas and gas light, has heretofore established, placed and laid down certain pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound street to Olive street and at divers and sundry other places beneath the surface of the streets of said City of St. Louis for supplying gas to its consumers and by means thereof relator has during more than ten (10) years last past carried on and still carries on its business as a lighting company, of all which said city, and the municipal authorities thereof had notice and have at all times acquiesced therein.

It is also true, that in order to produce or furnish light by means of electricity, it is necessary to use wires for conducting the same and to support said wires either on poles above the surface of the streets, as relator is now doing under a contract with the said City of St. Louis, or in tubes or conduits beneath said surface. Relator states that its purpose in making the excavation on Broadway mentioned in said petition was to construct and place under ground a conduit for wires, such conduit and wires being properly required for the production of electric light as a substitute for gas light; that the conduit and wires intended by relator to be so laid down are of the most approved description, such as are used for like purposes in other cities, said conduits

occupying, when completed, a space not exceeding thirty inches in width under the surface of the street, with provision for access thereto at suitable intervals through manholes, properly covered and protected, less than forty inches in width at the surface of the street, the said conduits and manholes, when completed and in use, offering no obstruction whatever to the use of the streets for travel and traffic, and the danger to life and property which attends the use of overhead electric wires, such as relator is now using under contract with said City of St. Louis for the purpose of lighting public streets and alleys therein, being entirely avoided by placing said wires in said conduits.

Relator denies that it has never acquired from the State of Missouri any right to place such wires above or beneath the streets of the City of St. Louis. Relator also denies that it is provided by section 2721 of article 5, chapter 42, Revised Statutes of Missouri, 1889, that no company shall place its wires or other fixtures underground in any city unless it shall first obtain the consent of said city through the municipal authorities thereof. Even if the provisions of said article 5 of chapter 42 of the Revised Statutes of Missouri, 1889, or of said section 2721, referred to by respondent, purported to relate or apply to this relator, such provisions would be invalid as impairing the obligation of the contract contained in relator's charter; but relator states that said article 5 of chapter 42 of the Revised Statutes of 1889 is a part of the general corporation law of this State, and that said section 2721 in terms applies exclusively to companies organized under the provisions of said

article 5 for the purpose of constructing and maintaining telephone or magnetic telegraph lines and to no other corporations or class of corporations.

Relator admits that by article 2, chapter 15, Revised Ordinances of the City of St. Louis, 1887, as amended by ordinance No. 16,894, the municipal authorities of said City of St. Louis undertook to prescribe certain conditions for placing wires, tubes, or cables conveying electricity along, across, or under the streets and alleys of said city, but states that the provisions of said ordinance are not fully set forth in respondent's return.

Relator states that the ordinance of the City of St. Louis last above mentioned and in said return referred to as article 2, chapter 15, Revised Ordinance of the City of St. Louis, 1887, as the same has been amended by ordinance No. 16,894, are the same ordinances which were revised and re-enacted by and are contained in article 11 of chapter 15 of the Revised Ordinance of the said City of St. Louis, 1892, to-wit, ordinance No. 17,188, entitled "An ordinance in revision of the ordinances of the City of St. Louis and to establish new ordinance provisions for the government of said city," approved April 7, 1893, said article two, chapter fifteen, being sections 603 to 614, both inclusive, of said revised ordinance No. 17,188; that by said revised ordinance No. 17,188 the Municipal Assembly of the City of St. Louis intended to and did revise and re-enact all ordinances of said city then previously existing in pursuance of section 29 of article 111 of the charter of said city, and that from and after the

17th day of April, 1893, the said sections 603 to 614 of said revised ordinance No. 17,188 were and are the only provisions of any existing ordinance of said city which purported to prescribe any regulations or conditions in respect of the placing by any person or corporation along, across, or under any of the streets, alleys, or public places in said city of any wires, tubes, or cables conveying electricity for the production of light, heat, or power, and that the said sections 603 to 614, inclusive, of said revised ordinance No. 17,188 are the ordinance provisions of said City of St. Louis which are averred in said respondent's return to be legal and binding and valid provisions and to be such as the City of St. Louis had the right to adopt and enact under the charter thereof.

Relator states and shows to the court that the said article 11, chapter 15, Revised Ordinance of the City of St. Louis, 1887, as the same was amended by ordinance No. 16,894 and as now contained in article 11, chapter 15 of the Revised Ordinance 1893, as sections 603 to 614 thereof, both inclusive, are in the words and figures following:

Article 11. Of electric wires, tubes and cables.

Sec. 603. Conditions of placing wires, etc. That no wires, tubes or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or public places in the City of St. Louis, by any person, corporation or association not having previous to the passage of this ordinance accepted and complied with ordinance number twelve thousand seven hundred twenty-three, now amended, or

shall be duly authorized by the municipal assembly, and then only as hereinafter provided. (Revised Ordinance 1887, Sec. 581, amended.)

Sec. 605. Application and plat to be filed. That any person or persons, corporation or association, duly authorized by ordinance to do business in the City of St. Louis and desiring to place along or across any of the streets, alleys or public places of the City of St. Louis, such wires, tubes or cables, shall file in the office of the Board of Public Improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes or cables. (Revised Ordinance 1887, Sec. 583.)

Sec. 606. Permit may be granted.—The Board of Public Improvements is hereby authorized, upon the filing of the application and plat required by the preceding section, to grant a permit for such occupancy of the streets, alleys and public places herein named, with such restrictions, regulations and qualifications as may be prescribed by said board and under the supervision and to the satisfaction of the supervisor of city lighting. (Revised Ordinance 1887, Sec. 584, amended.)

Sec. 607. Wires, etc., may be placed on telegraph poles, etc., when.—That in case any person or persons, corporation or association, duly authorized by ordinance, desiring to place along or across any of the streets, alleys or public places of the City of St. Louis, such wires, tubes or cables, shall, with the

application and plat heretofore provided for, file in the office of the Board of Public Improvements the written consent of any telegraph or telephone company, or any other electric light or power company, doing business in the City of St. Louis, to the placing of such wires, tubes or cables upon the poles of said telegraph, telephone, electric light or power company, situated in the streets, alleys or public places named in such application, the Board of Public Improvements is hereby authorized to grant a permit for such occupancy of the poles of such telegraph, telephone, electric light or power company, with such restrictions, regulations and qualifications as may be prescribed by said board and under the supervision and to the satisfaction of the supervisor of city lighting. (Revised Ordinance 1887, Sec. 585, amended.)

Sec. 608. Poles to be placed in alleys, when.—That whenever an alley is available for the placing of poles, for the support of such wires, tubes or cables, the Board of Public Improvements will advertise for five days previous to a day set for hearing objections or arguments in favor of placing the said poles in the alley. If, after due consideration, the Board of Public Improvements are of the opinion that the placing of poles for the purposes aforesaid is practicable, such poles shall be placed along said alley instead of along the street named in application. Where the poles are set in any alley they shall be located as near the side lines of the alley as practicable, and in such a manner as not to incommode the public or the adjoining proprietors

or residents. (Revised Ordinance 1887, Sec. 586 amended.)

Sec. 609. Dimensions, construction and location of poles.—The poles used as herein provided shall be of sound timber, not less than five inches in diameter, at the upper end, straight, shapely and of uniform size, neatly planed or shaved, and thoroughly painted with two coats of lead and oil paint, of such color as may be directed by the Board of Public Improvements, and be supplied with iron steps, commencing twelve feet from the surface of the ground and reaching to the arms supporting the wires, tubes or cables; said wires, tubes or cables shall be run at a height not less than twenty-five feet above the grade of the street. Whenever the poles are erected on a street they shall be placed, in all cases, when practicable, on the outer edge of the sidewalk, just inside the curbstone and on the line dividing the lots one from the other, and in no case be so placed as to obstruct the drainage of the streets, or interfere with or damage in any way the curbstones, trees or other public or private property on the line of the street or alley or public place where such pole shall be erected. (Revised Ordinance 1887, Sec. 587.)

Sec. 610. Streets and alleys to be replaced.—Any person or persons, corporation or association having made excavations in the streets, alleys or public places of the City of St. Louis for the purposes aforesaid, shall replace the streets, alleys or public places in such manner and in accordance with such regulations as may from time to time be prescribed by ordinance, or by the Board of Public Improve-

ments, and to the satisfaction of the street commissioners. (Revised Ordinance 1887, Sec. 588.)

Sec. 611. Alterations in location of poles, etc., may be ordered.—The right is hereby reserved to the Board of Public Improvements at any time to direct any alterations in the location of said poles, and also at the height in which the wires, tubes or cables shall run; but before any alteration is made, at least five days' notice in writing shall be given to the person or persons, or the president or the officer in charge of the company affected by the proposed alteration, and reasonable opportunity shall be afforded the representative of such company, or any citizen interested, to be heard in regard thereto. But when any such alteration shall be ordered, the said company shall within five days thereafter commence such alterations and complete the same as soon as practicable thereafter; and upon failure so to do, it shall be deemed guilty of a misdemeanor, and punished as hereafter provided. (Revised Ordinance 1887, Sec. 589.)

Sec. 612. Privileges conferred; on what conditions.—No person or persons, corporation or association, shall be entitled to any of the privileges conferred by this article, except upon the following conditions: That said person or persons, corporation or association, before availing himself or itself of any of the rights or privileges granted by this article, shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts

from his or its business arising from supplying electricity for light or power for the six months next preceding such statement, which shall be sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing such statement with the comptroller, pay into the city treasury two and one-half per cent. on the amount of such gross receipts up to the year eighteen hundred and ninety, and five per cent. on the amount of gross receipts thereafter. And said person or persons, or corporation or association, shall, at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars, with two or more good and sufficient securities, to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed regulating the placing of wires, tubes or cables in the streets and alleys for the purposes named therein; that he or it will comply with all the regulations made by the Board of Public Improvements having reference to the subject embraced in this article or any ordinance herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the City of St. Louis harmless and indemnified from all loss, cost, or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article. (Revised Ordinance 1887, Sec. 590.)

Sec. 613. Penalty.—Any person or persons, cor-

poration or association which, or any president, manager, superintendent, or officer in charge of any corporation or association who shall violate or fail to comply with any of the provisions of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than fifty dollars, nor more than five hundred dollars. (Revised Ordinance 1887, Sec. 591.)

Sec. 614. Reservation of rights.—The city reserves the right to alter, amend or repeal this article at any time. (Revised Ordinance, Sec. 592.)

It is true that relator did not previous to the passage of said ordinance No. 16,894 accept the provisions of said article 11, chapter 15, Revised Ordinance 1887, and that it has never accepted the provisions of said ordinance No. 16,894, and that it, said relator, has not been authorized by ordinance of the municipal assembly of the City of St. Louis to place its wires, tubes, or cables under the streets or alleys of said city.

Relator denies that the requirements of said city ordinances set forth were or are legal and binding and valid provisions so far as the rights of this relator under its charter were or are concerned, and denies that as against this relator said City of St. Louis had or has the lawful right or power to adopt or enforce the same, whether under the provisions of paragraph 2 of section 26 of article 111 of the charter of said city, as by respondent alleged, or under any other provision of the charter of said city.

Relator further shows to the court that by reason of the exemptions contained as aforesaid in section

8 of said Act of March 27, 1857, relator's charter as granted in and by said Act of 1857 and as subsequently amended by the Act of March 26, 1868, hereinbefore mentioned, was and is a contract by the State of Missouri with relator, which was not nor is subject to alteration, suspension, or repeal by the State of Missouri or by any municipality thereof; that said City of St. Louis had not nor has lawful power by ordinance or otherwise to impair the obligation of said contract, nor to abridge or interfere with the full exercise by relator of any corporate franchise thereby granted to it; that the enforcement against said relator of said provisions of said ordinance of said City of St. Louis would be a denial to relator of its corporate rights and franchises aforesaid and would impair the obligation of the said contract of the said State of Missouri contained in relator's charter as amended, and would be in contravention of section 15 of article 11 of the Constitution of Missouri, 1875, forbidding the General Assembly to pass any law impairing the obligation of contracts, and also of section 10 of article 1 of the Constitution of the United States, forbidding any State to pass any such law, each of which constitutional provisions is hereby referred to and relied on by relator for the protection of its corporate rights and franchises aforesaid in this behalf.

Relator further shows to the court that the only condition annexed by its charter, as amended, to the exercise by relator of its right to establish and lay down in said city all pipes, fixtures, or other thing properly required in order to carry on relator's said lighting business, is that the same shall be done

with as much dispatch and as little inconvenience to the public as possible, and avers not only that in making its arrangements and preparations to lay its wires under ground along and under the streets of said city as in its petition in this behalf alleged, and in applying to respondent as street commissioner of said city for a permit to make the necessary excavation therefor, relator has fulfilled every condition to which it was or is lawfully subject in that behalf, but also that respondent in refusing to relator such permit did not allege as a ground for such refusal, nor did in fact refuse such permit for the reason that by laying its wires under ground in the manner by it proposed relator would cause any inconvenience to the public, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city.

Relator shows to the court that, as against this relator, the said ordinances and provisions above mentioned are not valid, legal, or binding enactments, nor constitute any defense to this proceeding:

Because, as relator avers, said provisions are not, so far as relator's rights are concerned, lawful or reasonable regulations of the use of the streets of said city, but were intended to and do prohibit relator from exercising its said charter rights and powers except upon compliance by relator with conditions which the City of St. Louis has not nor has the Municipal Assembly thereof any lawful right or power to impose on relator in that behalf, including as one of said conditions that relator shall first be duly authorized thereto by the Municipal Assem-

bly, thereby impairing the obligation of the contract contained in relator's charter as amended.

Because the enforcement against relator by said cityor any officer thereof of the conditions prescribed by said ordinances would not be a lawful or reasonable exercise of the power of said city under its charter to regulate the use of its streets or of the police power of said city, but is an attempt by said city under control of its charter powers to compel relator to enter into the obligations and to pay to said city, from time to time, the tax of five per cent. upon the gross annual receipts from relator's business prescribed by section 590, article 11, chapter 15, of the Revised Ordinance 1887, re-enacted as section 612, article 11, chapter 15, of the Revised Ordinance 1892, above mentioned; forasmuch as it is provided by said section 590, article 11, chapter 15, of the Revised Ordinance 1887, re-enacted as section 612, article 11, chapter 15, of the Revised Ordinance 1892, that no person or persons, corporation or association shall be entitled to any of the privileges conferred by said article 11, chapter 15, except upon fulfilling the several conditions in said section 612 prescribed, as hereinbefore set forth.

Because among the conditions prescribed by said section 590, re-enacted as section 612, relator would be compelled before availing itself of any of the rights or privileges mentioned in said article 11, chapter 15, Revised Ordinance 1887, re-enacted as article 11, chapter 15, Revised Ordinance 1892, to file with the city register its penal bond in the sum of twenty thousand dollars, conditioned that rela-

tor will comply with all the conditions of said article 11 or with any ordinance which might thereafter be passed, and will comply with all regulations which may be made by the Board of Public Improvements having reference to the subject-matter embraced in said article 11 or any ordinance therein named; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract therein as aforesaid.

Because said article 11, chapter 15, Revised Ordinance 1887, re-enacted as article 11, chapter 15, Revised Ordinance 1892, purports to authorize the Board of Public Improvements of said city, in granting a permit for the use or occupation of the streets, alleys, and public places of said city for the purposes therein mentioned, to prescribe such restrictions, regulations and qualifications as said board may think fit in respect of the use of said streets, alleys and public places, and requires every person or corporation obtaining such permit, as a condition of availing itself of the privileges mentioned in said article 11, to agree to comply with all such regulations made by said board, whereas the power to regulate the use of the streets of said city, granted—clause 2, section 26, of article 11, of its charter, is granted only to the mayor and assembly of said city, to be exercised by ordinance not inconsistent with the constitution or any law of this State or with said charter, and does not authorize the said mayor and municipal assembly or either of them by ordinance, or otherwise, to delegate to the Board of Public Improvements of

said city, the power to make the regulations for the use of said streets. Wherefore, relator says, that said requirements and said condition are unlawful and void.

And relator says that the several conditions and requirements prescribed in said article 11, chapter 15, Revised Ordinance, 1887, as amended and re-enacted in article 11, chapter 15, Revised Ordinance, 1892, are not independent of each other, but are so framed as to subject relator, its officers and agents, to the penalties prescribed in section 591, of Revised Ordinance, 1887, re-enacted as section 613 of Revised Ordinance, 1892, unless, before placing along, across, or under any street of the City of St. Louis, any wires, such as hereinbefore mentioned, it, said relator, shall not only have obtained authority so to do from the municipal assembly of the City of St. Louis, but shall also have filed in the office of the Board of Public Improvements of said city an application therefor, such as prescribed in section 583, Revised Ordinance, 1887, re-enacted as section 605, Revised Ordinance, 1892, and shall have obtained a permit therefor from said board with such restrictions, regulations, and qualifications as by it prescribed, and shall also have filed with the city register its acceptance of all the terms of said article 11, chapter 15, and shall therein agree as required by section 590, Revised Ordinance 1887, re-enacted as section 612, Revised Ordinance 1892, to file with the comptroller of said city sworn semi-annual statements of its gross receipts from its business, and to pay to the city treasurer a tax of five per cent.

upon the amount of such gross receipts, and shall also have filed with the city register its bond in the sum of twenty thousand dollars, conditioned as prescribed in said section 590, Revised Ordinance 1887, re-enacted as section 612, Revised Ordinance 1892; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid.

Wherefor relator says that it was not under any legal obligation to apply to the municipal assembly of said city for authority, nor to the Board of Public Improvements of said city for a permit, to place its wires under ground in any street thereof, and that it was the duty of respondent as street commissioner of St. Louis, under the provisions of section 568, article 11, chapter 15, of the Revised Ordinance 1887, of said City of St. Louis, to issue to relator a permit for an excavation, such as applied for by relator.

Relator denies that either on the 26th of March, 1868, or on the 2d of March, 1857, lighting by electricity was wholly unknown to art. On the contrary, relator avers that long before either of said dates electricity had been used for illuminating purposes, and apparatus had been devised and publicly exhibited to great numbers of persons by means of which solid bodies were made incandescent by electric currents so as to produce light which could

be and was used for purposes of illumination, substantially as hereinbefore set forth.

THE LACLEDE GAS LIGHT COMPANY,
Relator,
By HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Its Attorneys.

That afterwards, on the 29th of June, 1895, respondent demurred to relator's reply or plea to the return, as follows:

In the Supreme Court of Missouri, April Term, 1895.

State *ex rel.* Laclede Gas Light Company, Relator,
vs.
M. J. Murphy, Street Commissioner, etc., Respondent.
No. 7434.

Now comes said respondent and demurs generally to relator's reply to this respondent's return herein and assigns the following grounds herefor, to-wit:

First. Because said reply does not state facts sufficient to constitute a defense to respondent's return.

Respondent further demurs specially to all that portion of relator's reply beginning at line 4 on page 1 with the words "that it, said relator, is advised," etc., and ending on line 12 of page 4 of said reply with the words "or any part thereof," and

assigns the following grounds for this special demurrer, to-wit:

1st. Because said matters are mere conclusions of law.

2d. Because said matters do not show any right or power in relator to have or ask the rights prayed for in this proceeding.

3d. Because said matters show on their face that relator's charter had expired prior to the institution of this proceeding, and therefore relator has no standing in court and no right to engage in business at all.

Respondent further demurs specially to all that part of relator's reply beginning at line 13 on page 4 thereof with the words "relator is advised and avers that even if the averment in respondent's return," etc., and ending on line 21 of page 6 thereof with the words "entirely avoided by placing said wires in said conduits," and assigns the following grounds for this special demurrer:

1st. Because it appears therefrom that relator has no power to manufacture or vend electricity.

2d. Because it appears therefrom that electricity may be used for producing light, and may be used in place of or as a substitute for gas light, but it further appears that relator never had any power to manufacture or use the same.

3d. Because it appears affirmatively from said reply that electricity is not a substance or material, and relator has no right to manufacture and vend the same.

Respondent further demurs specially to all that portion of relator's reply beginning at line 2 on

page 7 with the words "relator admits that by Art. 2, Chap. 15, Revised Ordinances of the City of St. Louis, 1887," etc., and ending at line 18 on page 13 with the words "as applied for by relator," and assigns the following grounds for this special demurrer, to-wit:

1st. Because it affirmatively appears from such allegations of relator's reply that relator is subject to the police regulations contained in said ordinance provisions.

2d. Because said ordinance provisions do not in any manner impair the obligation of any contract relator may have or at any time may have had, but they are valid regulations in any event.

Respondent further specially demurs to all that part of relator's reply beginning at line 19 on page 13 thereof with the words "relator denies that either on the 26th of March, 1868, or on the 2d of March, 1857, lighting by electricity was wholly unknown to art," and ending on line 25 of page 13 thereof with the words "substantially as hereinbefore set forth," and assigns the following grounds for this special demurrer, to-wit:

1st. Because relator never having had the right to manufacture or vend electricity, it is not material to it or to this controversy whether or not electricity was known to art on the 2d of March, 1857, or on the 26th of March, 1868.

2d. Because the Act of 1868 did not confer any more power on relator in respect to lighting by electricity than was conferred by the Act of 1857, and relator is not entitled to the benefit of anything

which became known to art in this respect between March 2d, 1857, and March 26th, 1868.

Respondent respectfully prays the court to pass upon each and every one of the propositions herein raised. The questions have all been fully presented and must at no distant future date be decided, and it will be labor saved, both for the court and counsel, to have the whole matter passed upon in this proceeding.

Respondent is perfectly willing to have the court pass on all these questions on the arguments and briefs heretofore made and filed; but if the court is not sufficiently advised concerning all of said matters, then respondent respectfully prays that the court will set a time for hearing further argument in the premises.

Respondent earnestly prays the court to settle all these questions in this proceeding at this time because of the great pressing necessity to the City of St. Louis to have these matters settled, for their bearing on other pending questions in this city make it absolutely imperative that they should all be definitely decided, so that the city may know what its rights are in determining the questions now before it with reference to the use of its streets.

Respectfully submitted,

W. C. MARSHALL,
Att'y for Respondent.

Thereafter, on the 1st of July, 1895, the respective parties hereto filed the following stipulation in the cause:

In the Supreme Court of Missouri. Court *in Banc.*

State *ex rel.* Laclede Gas Light Company, Relator, *vs.* Michael J. Murphy, Street Commissioner of the City of St. Louis, Respondent.	April Term, 1895. No. 7434.

It is hereby stipulated and agreed by and between the relator and the respondent in the above entitled cause, by their respective attorneys, as follows:

1. That by consent of said parties respectively and by leave of said court the City of St. Louis may enter its appearance as a party to said cause, intervening therein for its own interest in respect of the several matters and things in the petition of relator and in the alternative writ in this behalf set forth, and said city hereby enters its appearance herein, and the said City of St. Louis, by like consent and leave of court, hereby adopts as its own the return heretofore filed by respondent to said alternative writ, and also adopts as its own the demurrer filed by said respondent.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Attorneys for Relator,
W. C. MARSHALL,
Attorney for Respondent and for the City of St. Louis.

Afterwards, on the 2d of July, 1895, the Supreme Court of Missouri entered the following judgment in the cause:

Final Judgment.

The State of Missouri on the Relation of The Laclede Gas Light Company, Relator, vs. Michael J. Murphy, Street Commissioner of the City of St. Louis, and the City of St. Louis, Respondent.	*Mandamus.*

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court grants leave to the City of St. Louis to be made a party defendant herein and to adopt the return and demurrer heretofore filed by respondent Murphy, and thereupon the said demurrer of respondents Murphy and The City of St. Louis to the reply of relator being submitted, and the court, being now sufficiently advised of and concerning the premises, doth order and adjudge that the demurrer of respondents Murphy and The City of St. Louis to the reply of relator be sustained for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as part of this judgment. Thereupon in open court relator declines to plead further; and the court doth further order and adjudge that the peremptory writ of *mandamus* prayed for herein be, and the same is hereby, denied, and that the said respondents recover against the said relator their costs and charges herein expended and have therefor execution.

Afterwards relator (now plaintiff in error) filed in this Honorable Court, at the October Term, 1895, the following assignment of errors:

In the Supreme Court of the United States. October Term, 1895.

State of Missouri *ex rel.* Laclede Gas Light Co., Relator, Plaintiff in Error,
vs.
M. J. Murphy, Street Commissioner of the City of St. Louis, and The City of St. Louis, Respondent, Defendants in Error.

On the second Monday of October in this same term, before the justices of the Supreme Court of the United States, in the City of Washington, comes the relator, the said Laclede Gas Light Company, by its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to-wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said respondents and against the said relator, whereas by the law of the land the said judgment ought to have been given for the said relator and against the said M. J. Murphy and the City of St. Louis, and the writ of *mandamus* should have been awarded to relator as prayed for, and relator by its attorneys says:

That the Supreme Court of the State of Missouri erred in overruling relator's demurrer to respondent's return.

And the said court erred in overruling relator's motion to strike out portions of respondent's return.

And the said court erred in sustaining respondent's demurrer to relator's traverse and reply to respondent's return.

And said court erred in entering final judgment for respondents on the pleadings in this cause.

And said court erred in denying to relator the writ of *mandamus* prayed for in its petition in this behalf.

And the court erred in deciding that the ordinance of the City of St. Louis pleaded by respondents, and which is fully set out in relator's reply, is a valid ordinance and binding upon relator, and in deciding that said ordinance does not impair the obligation of a contract between relator and the State of Missouri, and does not impair the vested rights of relator under its charter and the franchises granted to it by the State of Missouri prior to the enactment of said city ordinance.

And said court erred in deciding that said ordinance of the City of St. Louis was a lawful exercise of the police power and binding as such on relator, and that relator was subject to all the provisions and requirements of said city ordinances in the conduct of its business, and that it was bound to accept the same with all its provisions and conform to all its requirements before using the streets of said city for laying its wires beneath the surface of the streets for the purpose of conducting electricity through the City of St. Louis for illuminating purposes.

And said court erred in holding that the art of producing by electricity was wholly unknown to science at the time the charter and franchise were granted to relator.

And the said Laclede Gas Light Company, relator, prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that

it may be restored to all things which it hath lost by occasion of the said judgment, etc.

THE LACLEDE GAS LIGHT CO.

By HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Its Attorneys of Record.

BRIEF.

I.

THE FIRST DEFENSE MADE BY RESPONDENT IS THAT THE ACT OF MARCH 26TH, 1868, IS UNCONSTITUTIONAL, NULL AND VOID, AND IS IN CONFLICT WITH PAR. 2, OF SEC. 1, OF ART. 8, OF THE CONSTITUTION OF MISSOURI 1865, WHICH PROVIDES AS FOLLOWS:

"NO LAW SHALL BE PASSED REVIVING OR RE-ENACTING ANY ACT HERETOFORE PASSED, CREATING ANY PRIVATE CORPORATION, WHERE SUCH CORPORATION SHALL NOT HAVE BEEN ORGANIZED AND COMMENCED THE TRANSACTION OF ITS BUSINESS WITHIN ONE YEAR FROM THE TIME SUCH ACT TOOK EFFECT, OR WITHIN SUCH OTHER TIME AS MAY HAVE BEEN PRESCRIBED IN SUCH ACT FOR SUCH ORGANIZATION AND COMMENCEMENT OF BUSINESS;" AND THAT THE LACLEDE GAS LIGHT COMPANY DID NOT ORGANIZE NOR COMMENCE BUSINESS WITHIN ONE YEAR AFTER THE PASSAGE OF THE ACT OF MARCH 2D, 1857, BUT, ON THE CONTRARY, DID NOT COMMENCE BUSINESS UNTIL THE YEAR 1873, AND THEREFORE THE ACT OF MARCH 26TH, 1868, WHICH WAS AN ACT REVIVING AND RE-ENACTING THE ACT OF MARCH 2D, 1857, IS IN CONFLICT WITH SAID CONSTITUTIONAL PROVISIONS.

The relator demurs to this defense on the ground that the Act of March 26th, 1868, is not a law reviving or re-enacting any act theretofore passed, and hence is not within the provisions of, nor in conflict with, said constitutional provisions. And furthermore, because, admitting that the Act of March 26th, 1868, is a law reviving or re-enacting

an act previously passed, yet under the Act of March 2d, 1857, relator does not come within the provisions of said constitutional provisions, because the Act of March 2d, 1857, did not specify any time within which relator should organize and commence business, but that by Sec. 8 of said Act of 1857, relator was specially exempted from the provisions of sections 6 and 7 of Art. 1 of the general law of the State of Missouri, concerning corporations then in force, being Secs. 6 and 7 of "An act concerning corporations," approved November 23d, 1855.

The charter powers of the Laclede Gas Light Company by the terms of the Act of March 2d, 1857, would expire on the 2d of March, 1887. Whilst it is true that Sec. 1 of the act gave the incorporators, their successors and assigns, the right to have "perpetual succession," yet by Sec. 5 of said act they were entitled to have and enjoy the rights, privileges and franchises granted, "during the continuance of this act," and by section 9 of the act it was provided that it "shall continue in force thirty years."

It is true that Sec. 6 of the act gave the City of St. Louis the right to purchase all of the property and effects of the Laclede Gas Light Company at any time within twenty years from the organization of said company, and provided that if the city failed or refused so to do, then the charter so granted should be "renewed and extended for the further period of thirty years after the expiration hereof."

If this act had never been amended the practical working thereof would have been this: Inasmuch as Sec. 8 of the act exempted the Laclede Gas Light

Company from the operation of Secs. 6 and 7 of the law of 1855, which required every corporation to organize and commence business within one year from the date of its charter, the Laclede Gas Light Company could have postponed the organization of the company to any date within the thirty years authorized for its duration, and the City of St. Louis would have had a right to purchase within twenty years from the date of such organization. If, therefore, the company organized in 1886, its life would have ceased in 1887, yet, the city would have had a right to purchase at any time within twenty years from 1886, or, in other words, the right to purchase would have extended nineteen years after the corporate rights of relator had ceased. But assuming that such is the legal incongruity flowing from the Act of 1857, still it is contended that the City of St. Louis failed within twenty years from the organization and commencement of business of the Laclede Gas Light Company to purchase the property and effects thereof, and hence its life was extended till 1917. On the contrary it is alleged in the return, and admitted by the demurrer, that said company did not organize and commence business until 1873 and it is alleged by relator, and admitted by respondent, that in 1868, five years before the company organized and commenced business, the right of the city to purchase was attempted to be taken away, if not actually taken away, by Sec. 3 of the Act of 1868. Hence, it follows, that before the right of the city to purchase had accrued, such right was taken away by the Act of 1868, if it was a valid act. Therefore, the life of the Laclede Gas Light Com-

pany cannot be construed to have been extended for thirty years more after March 2d, 1887.

If, however, the Act of 1868 is altogether unconstitutional, then inasmuch as the relator organized and commenced business in 1873, and inasmuch as the right of the city to purchase would extend until twenty years thereafter, to-wit, until 1893, and inasmuch as the corporate life of relator, by the terms of Sec. 9 of the Act of 1857, ceased in 1887, or five years before the expiration of the time the city had the right to purchase, it therefore follows that under this view the corporate life of relator cannot be held to be extended for thirty years after 1887.

The conclusion, therefore, is irresistible that in no event can it be held that the corporate life of relator was extended for thirty years after 1887, or in other words, until 1917.

UNLESS, THEREFORE, THE ACT OF 1868 EXTENDED THE LIFE OF RELATOR "FOREVER," THE FRANCHISES, RIGHTS AND PRIVILEGES OF THE LACLEDE GAS LIGHT COMPANY EXPIRED IN 1887.

The question, therefore, is: Was the Act of 1868 a constitutional act, within the power of the legislature to enact, in view of Par. 2 of Sec. 1 of Art. 8 of the Constitution of 1865, which prohibited the legislature from passing any law reviving, or re-enacting, any act theretofore passed creating any private corporation, where such corporation should not have been organized and commenced business within one year from the time such act took effect, or within such other time as may have been prescribed in such act for such organization and commencement of business.

It will be conceded, of course, that the Laclede Gas Light Company was specially exempted from the operation of Sec. 6 of the General Corporation Laws of 1855, and that it was, therefore, not obliged, under its charter, to organize and commence business within a year. But though this is true, it is likewise true that the Constitution of 1865 forbade the passage of any law reviving or re-enacting any act previously passed creating any private corporation unless such corporation had organized and commenced the transaction of its business within one year from the time the act of incorporation took effect. *The Laclede Gas Light Company was not exempted from these constitutional provisions, and, although its charter did not require it to organize within a year, still the constitution of* 1865 *prohibited the legislature from reviving or re-enacting its charter, because it had not organized within one year.* In other words, its charter would have continued until 1887, without question, but when the legislature undertook to revive or re-enact its charter, by the Act of 1868, it did so in violation of the constitutional provisions referred to, and the Act of 1868 is, therefore, null and void.

This conclusion follows, logically. But relator seeks to avoid the conclusion by contending that the Act of 1868 is not an act reviving or re-enacting the Act of 1857. Hence it becomes necessary to understand what is meant by reviving or re-enacting an act.

In this discussion, I shall content myself with considering what is meant by the term "re-enact."

Webster's Dictionary defines the word, "re-enact," to mean, "to enact again."

In all of the litigation between the City of St. Louis and the Gas Light Companies, the question here involved has never been referred to, nor passed upon by this or any other court.

The cases of the Mayor, etc., of Boonville v. Trigg, 46 Mo. 288, and French v. Woodward, 58 Mo. 66, did not discuss nor decide the question here involved, but were decided with reference to Sec. 25 of Art. 4, hereinafter referred to under the second defense in this case.

I contend that the Act of 1868 "enacts again" the Act of 1857, and relator, practically, concedes this in its motion to strike out the eight defense by assigning as one of the grounds therefor the following:

"And it further appears from the terms of said Act of March 26th, 1868, by which said Act of March 2d, 1857, was amended, as set forth in relator's petition, that all the rights, privileges and franchises granted to said relator by said fifth section of the Act of March 2d, 1857, were, by said amendatory Act of March 26th, 1868, *confirmed to relator*, without annexing to any such right, privilege or franchise, any condition that such substitute should be only such as was known to art at the date of the approval of said amendatory act."

It will aid in the solution of this question to ascertain what is meant by the word "enact." *Webster defines "enact" to be* "1, *to decree; to establish by legal and authoritative act; to make into a law; especially to perform the last act of legislation to, as a bill, giving it the validity of law.*" *"Re-enact" therefore means to do such acts over again.*

The Act of 1868 re-enacts the Act of 1857. The Act of 1857, in Sec. 5, conferred rights "during the continuance of this act," that is, until 1887. The Act of 1868 undertakes to confer these rights forever, thereby the Act of 1868 re-enacts the Act of 1857,

creating the Laclede Gas Light Company, and if the act is constitutional, according to relator's contention, extended the life of the corporation from 1887 to an unlimited period of time, and at the same time extended the rights and franchises, which, according to the Act of 1857, would have expired in 1887, to an indefinite term.

Without the Act of 1868 *relator has no legal existence now and no legal right to any of the franchises claimed.* It seems to me, therefore, too clear for argumemt, that the Act of 1868, re-enacts to a most essential and vital degree, the Act of 1857. If it does, then, isasmuch as it is admitted that the Laclede Gas Light Company did not organize and commence business within one year after 1857, it follows conclusively, that the Act of 1868 is just such an act as Par. 2 of Sec. 1 of Art. 8 of the Constitution of Missouri expressly prohibited the legislature from passing. *As stated before, the fact that the Laclede Gas Light Company was exempted from the operation of Sec.* 6 *of the Act of* 1855, *does not, in any manner, exempt it or the legislature from the operation of Par.* 2 *of Sec.* 1 *of Art.* 8 *of the constitution of* 1865.

The Act of 1868 further re-enacts and enlarges the Act of 1857, in this, that by Sec. 1, it provides that:

The Laclede Gas Light Company, "may, at any time, lease, sell, or dispose of any portion of said rights, privileges and franchises to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits aforesaid."

This is a most valuable franchise, the extent of which can only be appreciated, when it is understood that the relator claims, thereby, to have not only been vested with the power to exercise all the rights, privileges and franchises conferred upon it itself,

but also with the power to lease, sell or dispose of the right to other persons to do the same thing. In other words, to enjoy these rights itself, and also to permit other persons to enjoy the same rights at the same time upon such terms as to it might seem proper.

I do not concede for a moment, that this construction is the proper construction to place on this grant. I construe this part of the Act of 1868 to mean that the Laclede Gas Light Company can lease, sell or dispose of to other persons, the whole of its rights and franchises, or can lease, sell or dispose of only a part thereof, but that by as much as they sell, lease or dispose of them they strip themselves of the right to exercise such privileges themselves.

If the construction contended for by relator is the true construction, then this portion of the Act of 1868 amounts to a delegation of legislative power, and is, therefore, void. Prior to 1875, when the new Constitution of Missouri and the Charter of the City of St. Louis were adopted, the title to all streets and rights in the State was vested in the State, subject to the Act of Feb. 20th, 1865 (Sess. Acts 1864-5, page 439), and the legislature, alone, had power to permit any one to use the same, except for travel. Since the constitution of 1875, and the Charter of St. Louis were adopted, and under the Act of 1865, the right to control the use of the streets in St. Louis has been, and is now, vested in the City of St. Louis; and the Municipal Assembly alone, by ordinance, has the right to permit the streets and highways of the city to be used by any person, except for travel. This being so, the legislature could not grant to the

Laclede Gas Light Company the right to authorize any one else to use such streets and highways, for such an act would be clearly a delegation of the power vested in the legislature to a private and *quasi* public corporation, and in conflict with the rights of the City of St. Louis under the Act of 1865.

City of St. Louis v. Russell, 116 Mo. 248.

It is essential to the decision of this case that a construction be placed on this provision of the Act of 1868. For, unless it is done, the same question must arise, again and again, until it is finally settled, and to avoid litigation and settle the matter, I earnestly ask the court to pass on this proposition in this case.

In this respect the Act of 1868 re-enacts the Act of 1857, contrary to the provisions of the constitution of 1865, before referred to.

The Act of 1868 re-enacts the Act of 1857 in a further essential particular.

By the Act of 1857 the capital stock of the company was fixed at not less than fifty thousand dollars, and authorized to be increased to not more than two millions. The Act of 1868 authorizes the increase of the capital stock "to such amount as may be necessary to carry on its business."

This, too, in the face of Sec. 7 of Chap. 62, Rev. Stat. 1865, which provided as follows:

"Any private or public corporation may increase its capital stock to any amount not exceeding double the amount of their authorized capital, etc."

In this respect the Act of 1868 re-enacts the Act of 1857 and conflicts with the constitutional provisions of 1865.

II.

THE SECOND DEFENSE INTERPOSED BY RESPONDENT IS, THAT THE ACT OF MARCH 26TH, 1868, IS NULL AND VOID AND IN CONFLICT WITH SEC. 25, OF ART. 4, OF THE CONSTITUTION OF 1865, WHICH IS AS FOLLOWS: "NO ACT SHALL BE REVIVED OR RE-ENACTED BY MERE REFERENCE TO THE TITLE THEREOF; NOR SHALL ANY ACT BE AMENDED BY PROVIDING THAT DESIGNATED WORDS THEREOF SHALL BE STRUCK OUT, OR THAT DESIGNATED WORDS SHALL BE STRUCK OUT AND OTHERS INSERTED IN LIEU THEREOF; BUT IN EVERY SUCH CASE THE ACT REVIVED OR RE-ENACTED, OR THE ACT OR PART OF ACT AMENDED SHALL BE SET FORTH AND PUBLISHED AT LENGTH, AS IF IT WERE AN ORIGINAL ACT OR PROPOSITION."

The particular claim made in this respect by respondent is, that the Act of March 26th, 1868, is an act reviving and re-enacting the Act of March 2d, 1857, and that it violates this provision of the constitution of 1865, in that it refers to "all the rights, privileges and franchises granted to it by the 5th section of the act to which this act is amendatory," which language is absolutely unintelligible without reference to Sec. 5 of the Act of 1857, and reading it into the Act of 1868 the provisions of the Act of 1857, which conferred such rights, privileges and franchises; and that it strikes out from the 5th section of the Act of 1857, the words "during the continuance of this act," and substitutes therefor the word "forever;" and, in that, the Act of 1868 attempts to repeal Sec. 6 of the Act of 1857, by simply employing the following language: "and the 6th

section of said act, to which this act is amendatory, is hereby repealed."

Relator demurs to this defense, claiming that the Act of 1868 was not, and did not, purport to be an act reviving or re-enacting the Act of 1857, and that it did not amend, nor purport to amend, the Act of 1857, by striking out designated words and inserting others in lieu thereof.

In making this defense, I was not forgetful of the principles decided in the cases of State v. Chambers, 70 Mo. 265; State v. Thurston, 92 Mo. 325; State v. Hendricks, 98 Mo. 374; Morrison v. St. L., I. M. & S. Ry. Co., 96 Mo. 602; State *ex rel.* v. Miller, 100 Mo. 439; State v. Bennett, 102 Mo. 364, and Railroad v. Schaumbaugh, 106 Mo. 557.

Neither do I wish to be understood as contending that there cannot be an amendment or repeal by implication.

What I do insist upon is, that under the constitution of 1865 (Par. 4, Sec. 1, Art. 8), the legislature was prohibited from passing special acts creating corporations, except for municipal purposes, and that the policy of prohibiting the granting of special privileges to private corporations had become a necessity in this State, because of the great abuse to which the former power of the legislature had been put, either by accident, carelessness or design.

It was further established as the policy in this State, that the legislature should not give life to, nor extend, revive, re-enact or enlarge the powers of any corporation, except such as had organized

and commenced business within one year from the date of the passage of the act creating it.

It was also intended to put it beyond the power of the legislature to pass laws amending prior laws, by simply referring to the title, or by striking out a word here and there, and inserting another or others in lieu thereof, and thus leaving the law in such shape that the legislators themselves might not know exactly what they intended or were doing, or in such shape that the citizen could not determine for himself, without comparison of the acts, what the law was, and in many cases leaving the law in such shape that even conscientious lawyers disagreed as to what had been accomplished by such method of amendment; and also to put a stop to the practice of interested parties procuring the passage of bills so worded that the legislators themselves could not see the full meaning of the amendment, and only learned, after the amendment had been made, what they had done, many times that being what the legislature would not have knowingly done; and to require that all laws amending other laws should be published in full, like an original act, so that the legislature, the people and the lawyers could see, at a glance, what was intended to be done and what had been done.

In short, to borrow the language of the Supreme Court of Michigan, in People v. Mahaney, 13 Mich. 497, in construing a similar constitutional provision: "The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effects, and the public, from the

difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purports only to insert certain words, or to substitute one phrase for another in an act or section *which was only referred to but not published,* was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for the express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation."

The Act of 1868 does not, it is true, provide that certain words shall be stricken out and other words inserted in lieu thereof, and as I understand relator's contention it is that this provision applies only to "*such*" cases.

I might contend that the word "such" in this section should be rejected as a clerical inaccuracy, as was done in State v. Beasley, 5 Mo. 91, but I desire to take a broader view than this, and to say that the Act of 1868 does strike out words from the Act of 1857 and substitute other words therefor, in this, it strikes out the words "during the continuance of this act," from the Act of 1857, and inserts in lieu thereof the word "forever," and this, too, without any indication of an intention on the part of the legislature to accomplish any such purpose. This fact is only discoverable by a critical comparison and examination of the two acts, and it may reasonably be argued, that by proceeding in this method, the legislature, itself, did not understand the full meaning of the bill it was enacting, and certainly no layman would readily discover it. It was

to prevent the happening of just such things, that the constitutional provision here relied on was adopted.

But the Act of 1868 conflicts with this section of the constitution, because Sec. 1 of the act unquestionably amends Sec. 5 of the Act of 1857, and Sec. 1 of the Act of 1868 does not publish in full, as if it was an original act, or provision, what rights, privileges and franchises were intended to be granted by it, but refers to "the fifth section of the act to which this act is amendatory," for information as to what rights, privileges and franchises were intended to be exercised forever, and thus this case is taken out from the rule laid down in the cases of State v. Chamber, 70 Mo. 625; State v. Thurston, 92 Mo. 325; State v. Hendricks, 98 Mo. 374; Morrison v. Railroad, 96 Mo. 602; State v. Miller, 100 Mo. 432; State v. Bennett, 102 Mo. 356, and Railroad v. Schaumbaugh, 106 Mo. 557.

The case of Railroad v. Schaumbaugh, *supra*, was a condemnation case, instituted by the railroad. The owner of the land to be condemned filed exceptions to the appraisement of the commissioners, and the exceptions were tried by a jury. The defendant appealed. The railroad was incorporated by the Act of January 22d, 1857, with a capital stock of $2,000,000. No conditions precedent to its being entitled to the benefit of the act were imposed. Thereafter the Act of March 19th, 1866 (Sess. Acts, 1865-6, p. 222), was passed. The defendant claimed that its effect was to *revive* the charter of the railroad company, and that as it was not shown that the company organized and com-

menced business within one year after the Act of 1857 took effect, the legislature was prohibited by section 2 of article 8 of the constitution of 1865 from passing the Act of 1866.

The Supreme Court of Missouri held that there was no proof that the company had not organized and commenced business within one year after the Act of 1857 took effect, and that in the absence of such proof it would presume that it had done so, and that being a live company the constitution of 1865 did not apply.

In the case at bar the conditions are different. It is charged by the return and admitted by the demurrer, that the Laclede Gas Light Company did not organize *and* commence business until 1873. The constitution of 1865 required both organization and commencement of business within one year before the legislature could act. This record shows affirmatively that it is not within the constitutional requirement.

Moreover, I do not insist that the Act of 1868 *revives* the company. My contention is that it *re-enacts*, which may be done even as to a live company. To re-enact is as much prohibited as to revive a dead charter.

Hence the decision in the Schaumbaugh case is not applicable to the case at bar.

The Act of 1868 *cannot be construed as an amendment by implication, but as an attempt to amend the Act of* 1857, *without publishing, in full, even the section amended.*

An act amending an act by implication must be a perfect, enforcing act in itself, and cannot be an

act which must be read into the act amended, nor can it be an act which refers to provisions of acts, without publishing such provisions in full. This method of legislation comes under the rule laid down in Mayor of Booneville v. Trigg, 46 Mo. 288, and in French v. Woodward, 58 Mo. 66, and in People v. Mahaney, 13 Mich. 497.

From the days of Blackstone we have been taught that there are four cardinal rules for construing laws, to-wit: 1*st*, the letter; 2*d*, the context; 3*d*, the spirit and purpose, and, 4*th*, the effects and consequences.

In the case of St. Louis and San Francisco Railway Co. v. Evans and Howard Fire Brick Co., 85 Mo. 307, the Missouri Supreme Court adopted the rule of construction laid down in Story's Constitutional Limitations, expressed in the following language: "Every word employed in the constitution is to be expounded in its plain, obvious and common sense meaning, unless the context furnishes some ground to control, qualify or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for nicities of expression, for critical propriety, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use and fitted for common understanding. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense and cannot be presumed to admit

in them any recondite meaning or any extraordinary gloss."

In State *ex rel.* Harris v. Laughlin, 75 Mo. p. 150, that court, in laying down the rule for the construction of constitutional provisions, said: "In the solution of such a question when presented, resort should not be made to mere verbal criticisms, subtle distinctions, abstract reasoning or nice differences in the meaning of words; and in its consideration the maxim that 'he who sticks to the letter' in the construction of a law, 'sticks in the bark' is peculiarly applicable; *qui haeret in litera, haeret in cortice.*"

Applying these rules of construction to Sec. 25 of Art. 4 of the constitution of 1865, and construing the Act of 1868 in this light and spirit, it is evident that whilst the Act of 1868 does not provide that certain words should be stricken out and other designated words inserted in lieu thereof, and hence the Act of 1868 is not "such case" within the letter of the constitution, nevertheless gauged by the context, the spirit and purpose, and the effects and consequences, aye, measured by its plain, obvious and common sense meaning, stripped of subtleties, nicities and verbal criticism and read in the sense that the people understand it, and bearing in mind the abuses intended to be stopped, the mischiefs to be prevented and the endless confusion to be guarded against, in the light of the history of the adoption of this constitutional provision, I confidently assert that the Act of 1868 falls within the constitutional prohibition quoted, as much as if it

had taken the form prohibited, of striking out words and inserting others in lieu thereof.

Unless this construction is the true construction to be placed on this constitutional prohibition, then the results could be attained, the abuses perpetuated and the mischiefs re-enacted in any case by adopting a different form of expression, that is, by amending a prior act by striking out certain words and inserting others in lieu thereof, without saying, in express terms, that the amendment should be accomplished in that manner.

Aye more, the method here adopted is more pernicious and fraught with more danger than the method previously in force. The former method called attention to the fact that the legislature intended to amend a certain law in a certain method, and the average intelligent citizen could thus, by comparison, see exactly the effect of the amendment, whereas the method here employed does not even call attention to the fact that an amendment is intended, nor to the words to be stricken out and the words to be substituted, but leaves it open to possible litigious dispute as to what words should be stricken out and what words inserted in order to accomplish the result. There can be no manner of doubt that this method of amending a law is contrary to the spirit and purpose of the constitutional provision quoted, and that the effects and consequences are infinitely more objectionable and dangerous than the old method. In a word, if this constitutional provision can be circumvented in this manner, then the provision will have made

possible a greater evil than that intended to be remedied by it.

As before shown this act accomplishes this result, covertly, and in the most insidious and dangerous method imaginable.

III.

THE THIRD DEFENSE INTERPOSED BY RESPONDENT IS THAT THE CHARTER OF THE RELATOR, BY THE TERMS OF SEC. 9, OF THE ACT OF 1857, EXPIRED ON THE 2D OF MARCH, 1887, AND HENCE RELATOR IS NOT ENTITLED TO ANY OF THE PRIVILEGES, RIGHTS AND FRANCHISES CLAIMED BY IT.

The demurrer attacks this defense on the following grounds:

First. That it is erroneous, and inconsistent with the other provisions of the Act of 1857. Second. Because Sec. 6 of the Act of 1857, authorized the city to purchase the property and effects of the company at any time within twenty years after its organization, and provides that if the city fails so to do, the charter shall be extended for an additional term of thirty years, and alleges that the city failed to purchase; and Third, that if the Act of 1868 amending the Act of 1857 is unconstitutional, then Sec.6 of the Act of 1857 is still in force, and that as the city never purchased relator's charter will run until 1917; but if the Act of 1868 is valid, then relator's charter continues forever.

I will discuss this proposition under these three points set out in the demurrer.

FIRST. Is respondent's contention, that under Sec. 9 of the Act of 1857, relator's charter expired in 1887, erroneous and inconsistent with the other provisions of said Act?

Sec. 1 of the Act of 1857, conferred the right to have "perpetual succession."

Sec. 5 granted the rights, privileges and franchises

therein specified "during the continuance of this act."

Sec. 6 gave the city the right to purchase, at any time within twenty years from the date of the organization of the company, and provided that if the city did not purchase, the charter of the company should be extended thirty years after the expiration thereof.

Sec. 9 limited the duration of the company by providing that it should "continue in force for thirty years."

The history of corporations teaches us that there were, originally, two kinds, to-wit: Sole and aggregate.

"A sole corporation, as its name imports, consists only of one person, to whom and his successors belong that legal perpetuity, the enjoyment of which is denied to all natural persons."

1 Blackstone's Com. 469.

"An aggregate corporation, as its name will readily suggest, consists of several persons, who are united in one society, which is continued by a succession of members."

2 Kent, Com. 221.

In Dartmouth College v. Woodward, 4 Wheat. 636, it is said:

"A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to

its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."

In Providence Bank v. Billings, 4 Pet. 562, the court said: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

Thus the words "perpetual succession" in a charter do not mean that a corporation shall live forever or be immortal, but that "the immortality of a corporation means only its capacity to take, in perpetual succession, as long as the corporation exists, so far is it from being literally true that a corporation is immortal, many corporations of recent creation are limited in their duration to a certain number of years. A corporation may not only be limited, as to duration, in its commencement, but,

without limitation, may be dissolved, and, consequently, cease to exist for want of members; also by voluntary surrender of franchise, forfeiture, by misuser," etc.

2 Kent Com. 215.

Recognizing this doctrine, in the case of Fairchild v. Masonic Hall Association, 71 Mo. 526, it was held: That where the right to have perpetual succession was granted, the corporation was clothed with the capacity to live forever, but that where the act creating the corporation conferred the right or capacity of perpetual succession, but limited the duration to a certain number of years, such limitation restricted the meaning of the words "perpetual succession," and at the expiration of the limited period the corporate life ceased.

Applying these principles then to the Act of 1857, we find that by Sec. 1 this company was given the *capacity* of perpetual succession; and by Sec. 5 was granted rights, privileges and franchises "*during the continuance of this act;*" and by Sec. 9 the duration of *the life of the corporation was limited to thirty years.*

If this was all, no doubt could arise that the life of this corporation expired in March, 1887. So that so far from respondent's contention being erroneous or that section 9 of the act is inconsistent with the other provisions of the act, there is no room for controversy, and relator's contention in this regard should be decided against it.

SECOND. Relator contends that Sec. 6 of the Act of 1857 confers upon the city the right to purchase,

at any time within twenty years, after the *organization* of the company, and that as the city failed so to do, the corporate life was extended for an additional term of thirty years.

The fact is that although the charter was granted in 1857 the Laclede Gas Light Company never organized and commenced business until 1873. Under Sec. 6 of the Act of 1857, the City of St. Louis would have therefore until 1893 to determine whether it would purchase. The thirty years limited by Sec. 9 of the act expired in 1887. In other words, relator's contention is that by delaying the organization of the company until 1873, and by the twenty year option which the city had, and which the city was not obliged to exercise until 1893, the charter of relator was kept alive from 1887 until 1893, and that as the city failed to exercise its option in 1893, the corporate life of relator was extended for thirty years after 1887, to-wit: until 1917. That this is a most fallacious and untenable argument can be easily demonstrated. Suppose the company had not organized until 1886, the city would then have had twenty years from that time, or until 1906, in which to purchase, and failing to purchase before 1906 relator's charter would be extended for thirty years after 1887; or, in other words, relator's contention contemplates that it could permit twenty-nine years of its chartered life to expire before it organized, and then it could be kept alive for twenty years after the expiration of such twenty-nine years, because the city had the right to purchase at any time within twenty years after its organization, and failing so to do, the relator's corporate life would be then ex-

tended thirty years from the date when, by the terms of Sec. 9 of the act, it would expire otherwise.

This point hardly seems possessed of enough merit for serious consideration. The legislature never intended any such consequence to arise from the Act of 1857, and I deny that any such incongruity can, logically, be created, or deduced from the provisions of Sec. 6 of the act. Though by the act the company was exempted from the necessity of organizing and commencing business within a year after the passage of the act creating it, nevertheless the legislature never intended, and the act is not susceptible of the construction, that the option given the city should bridge over the time between 1887 and the expiration of the twenty-year option, but on the contrary, it was intended that the company should organize and commence business within a reasonable time so that the twenty-year option should not run beyond 1887.

When it is remembered that this company never organized and commenced business until after the Act of 1868 was passed; and when it is remembered that the Act of 1868 expressly undertook to repeal Sec. 6 of the Act of 1857, and thereby take away the city's option; and when it is remembered that the city's right to purchase began only after the organization of the company, and that such organization did not take place until 1873, the extremity of desperation which begat this contention, on the part of relator, will be readily understood, and I think further comment unnecessary.

THIRD. Relator, however, contends that if the Act of 1868 is invalid, then Sec. 6 of the Act of

1857 is not repealed, and its charter is continued until 1917 under said section 6. This contention has already been considered above.

Relator further contends that the Act of 1868 is a valid act, and, therefore, its corporate life is to continue forever.

As hereinbefore shown, the Act of 1868 amends Sec. 5 of the Act of 1857 without saying so, by providing that the rights, privileges and franchises conferred by Sec. 5 of the Act of 1857 should be held and enjoyed by relator "forever," instead of "during the continuance of this act," as Sec. 5 of the Act of 1857 provided.

No change was made by the Act of 1868, in Sec. 1 or section 9 of the Act of 1857, so that the Act of 1857, amended by the Act of 1868, if the Act of 1868 is a legal act, would read in this way: The company is given the right in Sec. 1 to have "perpetual succession;" is given the right by Sec. 5 to enjoy its franchise "forever;" and Sec. 6 which gives the city an option within twenty years and extends the life of the company an additional thirty years, if the city did not purchase, is stricken out; and by Sec. 9 the continuance of the act, as thus amended, is limited to thirty years from the date of its passage, to-wit, to March 2d, 1887.

THUS SEC. 1 CONFERS THE CAPACITY OF IMMORTALITY; SEC. 5 GIVES THE COMPANY UNLIMITED DURATION; AND SEC. 9 LIMITS THE LIFE OF THE COMPANY TO THIRTY YEARS AFTER MARCH, 1857.

I seriously doubt if greater statutory inconsistency can be found in the laws of any State. This condition arises, and naturally arises, from the methods

employed in this case to circumvent the provisions of Sec. 25, Art. 4, and from disregarding the provisions of Par. 2, Sec. 1, of Art. 8, of the constitution of 1865, and conclusively shows that the legislature was trapped by the Act of 1868 into advertising itself to the world in the peculiar light of having in one section provided that the corporate life of relator should continue forever, and in another section providing that such corporate life should expire in 1887.

A stronger illustration of the perniciousness of this method of legislation could scarcely be conceived.

Such, however, is the condition now presented if the Act of 1868 is constitutional, and it devolves upon this court to say whether the provisions of Sec. 5 confer eternal life on relator, despite the limitation of that life to thirty years by Sec. 9, or whether notwithstanding this peculiar legislative legerdemain, the life of relator is limited to March 2d, 1887, in spite of the amendment by the Act of 1868 to Sec. 5 of the Act of 1857.

Before entering upon the examination of this question, it is proper to inquire what is meant by the words "perpetual" and "forever."

Webster defines "perpetual" to mean: "Never ceasing; continuing indefinitely or infinitely; unending; not subject to, or suffering cessation or interruption; everlasting; enduring; incessant;" and the same author defines "forever" to mean: "To eternity; eternally; through endless ages." He also gives as the synonyms of "forever" the follow-

ing: "constantly; continually; invariably; unchangeably; incessantly; always; *perpetually*, etc."

There is, therefore, no substantial difference between the meaning of the two words, and if the Act of 1857 had simply provided that relator should have "perpetual succession," and had not limited that duration in the act, under the decision in Fairchild v. Masonic Hall Association, *supra*, relator would have continued forever; but because Sec. 9 of the Act of 1857 limited this perpetual, eternal existence forever to thirty years after 1857, relator's life expired at that time.

By changing the term, "during the continuance of this act," to the term, "forever," in Sec. 5 of the Act of 1867, no greater perpetuity was granted to relator than it possessed under the right given it in Sec. 1 to have "perpetual succession," and if Sec. 9 of the act limited the perpetuity conferred by Sec. 1, it likewise limited the perpetuity conferred by the amendment to Sec. 5 as above.

It is a cardinal rule of construction of laws as well as of contracts that the more particular always prevails over the more general. This doctrine was recognized in deciding the Fairchild case, and the same principles obtain here and are equally conclusive as applied to the word, "forever," injected by the Act of 1868 into Sec. 5 of the Act of 1857.

The same conclusion would follow if an act, in its first section prescribed, that A should enjoy certain franchises forever, and then in the same, or a subsequent section, provided that such franchises should be enjoyed only for a specified number of years; such an act would be read to mean: The franchises

here conferred shall be enjoyed forever: provided, however, that the term "forever" here employed shall be taken to mean only thirty years and the franchises here conferred shall cease at the expiration of thirty years. An act in such language, would be a legal curiosity, and yet no court would have any difficulty in holding that the thirty year limitation controlled. Exactly this condition is presented in this case by the Act of 1857, as amended by the Act of 1868, and I confess my utter inability, in the light of the decision in the Fairchild case to comprehend wherein the Act of 1868 extended the life of the relator company beyond the thirty years which Sec. 9 of the act, as amended, provided that it should continue in force.

I, therefore, conclude that the corporate life of relator expired on the 2d of March, 1887.

The relator, however, contends that the proper construction to put on the Act of 1868 is that it is to be regarded as amending by implication the whole of the Act of March 2d, 1857, and not merely an amendment of a part thereof, and hence that section 9, of the Act of March 2d, 1857, is repealed by implication by the Act of 1868.

Respondent contends that this is an ingenious and original argument, but is not effective or convincing.

The Act of 1868 is entitled: "An act to amend an act to incorporate the Laclede Gas Light Company, approved March 2d, 1857." The first section of the act as hereinbefore shown amends section 5, of the Act of 1857, without in terms saying so, and also refers specially to section 5. The second sec-

tion amends section 2, of the Act of 1857, by removing the limit to the amount of capital stock the company may have, without, however, specifically referring to section 2, of the Act of 1857. Section 3 declared that it shall not be construed as affecting the vested rights of the St. Louis Gas Light Company, and then specifically repeals section 6, of the Act of March 2d, 1857. Section 4 repeals the Act of March 3d, 1857; and section 5 provides that the act shall take effect from its passage.

Thus the Act of 1868 changes sections 5 and 2, of the Act of 1857, without specifically referring to the sections changed, and repeals the 6th section of the Act of 1857, and repeals the Act of March 3d, 1857; both in express terms.

On the face of the Act of 1868, therefore, it is manifest that it was the intention of the legislature to affect only sections 2, 5 and 6 of the Act of 1857, and the Act of March 3d, 1857, and not to touch in any manner section 9 of the Act of March 2d, 1857.

Ever since the decision of the case of State v. Morrow, 26 Mo., p. 141, it has been the established law, in Missouri, at least, that: "*The repeal of one clause of a section specifically raises a clear implication that nothing else was intended.*" And further, that: "A repeal of statutes by implication is not favored in the law. These laws all being in relation to the same subject, and in *pari materia*, must be so construed as to make them all stand."

Under this interpretation of the law, it follows clearly that inasmuch as the legislature, by the Act of 1868, referred to sections 2, 5 and 6 of the Act of 1857, and to the Act of March 3d, 1857, it is con-

clusively presumed that the legislature did not intend to repeal, impair or in any manner affect section 9 of the Act of March 2d, 1857.

Possibly the Laclede Gas Light Company, in seeking the passage of the Act of 1868, thought and intended that it would have the effect of repealing section 9 of the Act of March 2d, 1857, but no such intention can be gathered from the words used in the Act of 1868, and under the legal rule above referred to, there can be no question that the Act of 1868 does not repeal, by implication, section 9 of the Act of March 2d, 1857.

But, as I understand it, the relator argues that it would not have accepted the Act of 1868 if the effect of it was to cut off its corporate existence in 1887; for under the Act of 1857, if the City of St. Louis failed to purchase its plant as provided in section 6 thereof, within 20 years after the company was organized its corporate existence would be extended for 30 years after the original 30 years prescribed in section 9, that is, until 1917. Whatever may be said of the wisdom, or want thereof, of the Laclede Gas Light Company in accepting the Act of 1868, the fact remains that it did so, and having done so the court can only construe what the legal effect of that act is, and I respectfully submit that its legal effect is to terminate the corporate life of the Laclede Gas Light Company on the 2d of March, 1887.

IV.

THE SIXTH DEFENSE INTERPOSED BY RESPONDENT IS THAT ART. 2, CHAP. 15, REV. ORD. 1887, AS AMENDED BY ORDINANCE NO. 16,894, PROVIDES THAT NO WIRES, TUBES, CABLES, ETC., CONVEYING ELECTRICITY FOR THE PRODUCTION OF LIGHT, HEAT OR POWER SHALL HEREAFTER BE PLACED ALONG OR ACROSS ANY OF THE STREETS, ALLEYS OR PUBLIC PLACES IN THE CITY OT ST. LOUIS, BY ANY PERSON, CORPORATION OR ASSOCIATION NOT HAVING PREVIOUS TO THE PASSAGE OF THIS ORDINANCE ACCEPTED AND COMPLIED WITH ORDINANCE NO. 12,723 NOW AMENDED, UNLESS THE SAME SHALL BE DULY AUTHORIZED BY THE MUNICIPAL ASSEMBLY, AND THEN ONLY UPON CONDITION THAT THE PLANS SHOWING THE PLACES TO BE OCCUPIED, THE MANNER OF INSULATION, ETC., BE APPROVED BY THE BOARD OF PUBLIC IMPROVEMENTS, AND UNDER A PERMIT ISSUED BY IT; THAT THE RELATOR HAS NOT BROUGHT ITSELF WITHIN THE PROVISIONS OF THIS ORDINANCE BY EITHER APPLYING FOR OR OBTAINED SUCH ORDINANCE AND PERMIT, AND THAT PAR. 2, OF SEC. 26, OF ART. 3, OF THE CHARTER OF THE CITY OF ST. LOUIS, CONFERS THE POWER UPON IT TO ENACT THIS ORDINANCE.

Relator attacks this defense on the ground that its charter constitutes a contract between the State and relator, which, under Sec. 8, is not liable to be altered, suspended or repealed without the consent of the corporation, and that neither the State nor the city has the right to pass any law or regulation which in any manner impair the rights, privileges and franchises granted to it, but that such a law or regulation would be in contravention of Sec. 15,

Art. 2, of the Constitution of Missouri, 1875, which forbids the General Assemby from passing any law impairing the obligation of contracts, and also would be in contravention of Sec. 10, of Art. 1, of the Constitution of the United States which forbids any State from passing any such law; that the ordinance provisions quoted and relied on would impair the obligation of relator's claimed contract.

I think I can conclusively show, by the decision of the highest court in America, that this contention of relator is untenable. A similar question arose in New York, in the case of People of the State of New York *ex rel.* Electric Lines Company v. Squire, 145 U. S. 175; *Ibid.* 14 Daly, 154; *Ibid.* 107 New York, 593.

The relator in that case was organized on the 14th of October, 1882, under the general telegraph law of April 12th, 1848 (Laws, New York, 1848, C. 265): "For the purpose of owning, constructing, using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communications and for electric illumination, to be placed under the pavements of the streets, avenues and public highways of the cities of New York and Brooklyn in the State of New York, and under the sidewalks of the streets and avenues of said cities."

Sec. 5 of the law of 1848 authorized such companies to construct their line, "along and upon any of the public roads and highways, or across any of the waters within the limits of the State, provided the same shall not be so constructed as to incommode the public use of said roads or highways or in-

juriously interrupt the navigation of said waters."

Sec. 2 of the Act of 1853, amended Sec. 5 of the law of 1848 by inserting the word "under" in Sec. 5, aforesaid.

Sec. 1 of an Act of 1881, provided that: "Any company or companies organized and incorporated under the laws of this State, or partly within and partly beyond the limits of this State, are hereby authorized, from time to time, to construct and lay lines of electrical *conductors underground* in any city, village, or town within the limits of this State, subject to all provisions of law in reference to such companies not inconsistent with this act; provided that such companies shall, before laying any such line in any city, village or town of this State, first obtain from the common council of cities, the trustees of villages or the commissioners of highways of towns, permission to use the streets within such city, village or town for the purposes herein set forth."

Within a few months after the incorporation of the company in 1882 said company procured from the Board of Aldermen of New York City the right to put its wires underground.

The company took no steps towards putting its wires underground until after the passage of the Act of June 13th 1885 (Sess. Laws, 1885, C. 499).

The Act of 1885 created the board of commissioners of electrical subways, and required all companies operating or intending to operate electric conductors in any city in the State to file with the board, maps and plans before constructing the conduits, and the Act of May 29th, 1886 (Sess. Laws, 1886

C. 503), required the several companies operating electric conductors in that State to pay the salaries and expenses of said board, making it applicable to companies organized *before* the passage of either of said acts as well as those organized afterwards.

The New York electric lines company undertook to excavate in the streets of New York for the purpose of putting down a conduit for carrying electric wires. The defendant Squire, who held the office of commissioner of public works (similar to defendant's office of street commissioner in this case) refused to permit the relator to put down such conduits or make such excavations. Thereupon the relator applied to the Court of Common Pleas in New York for a writ of *mandamus* against the commissioner of public works to compel him to issue a permit to relator (just as has been done in this case), claiming that inasmuch as relator was chartered by the State under a law which gave it the right to put down conduits and to do an electrical business, and was authorized by the Board of Alderman of the City of New York so to do before the passage of the Acts of 1885 and 1886, it had a contract with the State and the city which could not be impared by any subsequent law passed by either the State or the city (just as relator claims here).

The application was denied by the Court of Common Pleas on the ground that relator had not obtained the approval of the commissioners of electrical subways for that city of the plans and specifications prepared by it for the construction of its underground electrical system (just as respondent

here contends that this relator has not obtained such approval and permit from the Board of Public Improvements, *who, under the ordinance referred to, alone has power to grant such permit*).

The company appealed to the general term of the Court of Common Pleas where the judgment below was affirmed. Thereupon successive appeals were taken to the Court of Appeals and the Supreme Court of New York, which in turn affirmed the judgment of the lower court, and, finally, the case was taken by writ of error to the Supreme Court of the United States. And that court held that the Acts of 1885 and 1886 were constitutional both under the Constitution of New York and of the United States, saying: "*The State law of* 1885 *simply transferred the reserved police power of the State from one set of functionaries to another and required the company to submit its plans and specifications to the latter, who would determine whether they were in accordance with the terms of the ordinance giving it the right to enter and dig up the streets of the city, and being so construed it violates no contract rights of the company which might grow out of the permission granted by the municipality.*

The said Act of 1886 *comes within the principles settled in Charlotte, etc., Railroad v. Gibbs,* 142 *U.S.* 386, *and is not in conflict with the provision of the* 14*th Amendment that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law.*"

This case was decided by the Supreme Court of the United States on the 2d of May, 1892, and fits

the case at bar exactly, covering every point contained in this contention of relator.

It is respectfully submitted that further argument or citation is useless on this branch of the case in view of this decision, and that this contention must be decided against relator, not only on the general principles of police power adjudicated by the case cited, *but also because the respondent in this case, the street commissioner of the City of St. Louis, under the provisions of the ordinance quoted, has no power to grant a permit to relator, but that the power is vested in the Board of Public Improvements of St. Louis, just as in New York it is vested in the Board of Commissioners of Electrical Subways and not in the Commissioner of Public Works.*

Respondent's Brief on Motion to Strike Out Parts of Respondent's Return.

I.

THE FOURTH DEFENSE INTERPOSED BY RESPONDENT IS THAT EVEN CONCEDING ALL THAT RELATOR CLAIMS WITH REFERENCE TO THE VALIDITY OF THE ACT OF MARCH 26TH, 1868, AND OF THE ACT OF MARCH 2D, 1857, NEVERTHELESS, RELATOR IS NOT ENTITLED TO THE RELIEF ASKED FOR IN THIS CASE, BECAUSE IT HAS NEVER BY ANY ACT BEEN GRANTED A FRANCHISE TO MAKE AND VEND ELECTRICITY FOR ANY PURPOSE WHATEVER, BUT THAT WHATEVER RIGHTS, PRIVILEGES AND FRANCHISES IT EVER ENJOYED, WERE CONFINED TO MAKING AND VENDING GAS, GAS LIGHTS, GAS FIXTURES AND ANY SUBSTANCE OR MATERIAL USED AS A SUBSTITUTE THEREFOR, AND THAT ELECTRICITY, WHETHER USED FOR LIGHTING OR POWER PURPOSES IS NOT A SUBSTANCE OR MATERIAL, AND HENCE RELATOR HAS NO RIGHT TO MAKE AND VEND THE SAME ANYWHERE.

THE RETURN FURTHER SHOWS THAT THE RELATOR HAS HERETOFORE PLACED ITS PIPES AND FIXTURES FOR DISTRIBUTING GAS BENEATH THE SURFACE OF THE STREET AT THE IDENTICAL POINTS IT NOW PROPOSES TO PUT CONDUITS FOR ELECTRIC WIRES, AND THAT IT HAS NEVER ACQUIRED FROM THE STATE OF MISSOURI, OR THE CITY OF ST. LOUIS ANY RIGHT TO PLACE SUCH WIRES ABOVE OR BENEATH THE STREETS OF SAID CITY.

Relator moves to strike out this defense on the following grounds:

FIRST. That it is immaterial and not responsive

to the averments in relator's petition, but is an attempt to tender a false and immaterial issue in respect to the rights and relief sought by relator; for as much as relator's charter gives it the right to lay down in the street all pipes, fixtures and other thing required in its business of making and vending gas, gas lights, gas fixtures and any substance or material which at the date of its charter was or thereafter might be used as a substitute therefor, "and especially the right which relator claims under its charter to lay down, under said streets, in pipes or conduits suitable therefore, wire by means of which to transmit currents of electricity for the production of electric light as a substitute for gas light."

Relator, further, assigning reason for the motion, says, "that it is a matter of common knowledge, and of which relator submits that the court will take judicial notice, that in making or producing gas light, by means of ordinary illuminating gas, the carbon which is a component part or element of such gas is brought to a condition of incandescence by the application of heat; and it is also a matter of common knowledge, and of which the court will take judicial notice, that in making or producing electric light, which for past years has been, and is now, largely used as a substitute for gas light, the carbon which is used for arc lights in the form of rods or pencils and for incandescent lamps in the form of a condition of incandescence by generating and transmitting through said carbon what is called electricity; the light or illumination produced in either case being, as is commonly known, the result

of the incandescent condition of the carbon used and the effect thereof upon the organs of sight."

This is not an immaterial matter, and the fact that it is not responsive to the averments of relator's petition makes no difference, inasmuch as respondent can set up any new matter, in a return to an alternative writ of *mandamus*, which will show that relator ought not to have the relief asked.

I further respectfully submit that this is not a matter of common knowledge of which the court can take any notice.

On the contrary, I assert that it is now the recognized fact, among all persons who have any knowledge on the subject, that the illumination produced by gas is due to the presence of incandescent particles of carbon or other substance or material in the flame, or at the place where combustion of the gas takes place:

I further submit that it is likewise the fact that the illumination produced in an electric light is due to the passage of a current of electricity through any substance or material placed in the circuit (of the current of electricity) thereof, and the energy of the current is resisted thereby to an extent that the energy expended is sufficient to render the resisting material or substance hot to a degree of incandescence, and that this is equally true of arc or incandescent lamps.

I further submit that it is likewise the fact that the use of carbon in an electric light is not necessary as the resisting material, but that other resisting materials, such as platinum, may be used for the same purpose and with the same effect, and

that carbon pencils are used simply on account of the cheapness thereof.

I further contend that gas must, necessarily, be distributed by means of pipes, and that the particles of carbon therein become ignited when coming in contact with flame; whereas electricity has no particles of carbon, in suspension, and can only be distributed by means of wires, and unless there is some resisting substance in the circuit there will be no electric light. Electricity, as is now universally known, is in no sense of the word, a substance or material. It is true, if it comes in contact with an inflammable substance, it will produce flame or light, but in itself it is neither flame nor light, neither is it a substance nor material.

These principles are fully recognized in all modern encyclopædias and in all works on the subject, and I specially refer the court to Oliver J. Lodge's work entitled "Modern Views of Electricity," 2d Ed. 1892, especially Sec. 149, p. 284, *et seq.*, and may be pardoned for quoting the following statement from the author: "It is not too much to say that a boy turning a handle could if his energy were properly directed, produce quite as much real light as is produced by all this mass of mechanism and consumption of material."

It is true that the carbon, platinum or other resisting substance is a material and is destroyed in producing light, but it is likewise true that no amount of carbon or platinum or other resisting substance can produce electric light without the aid of a current of electricity, and that the electric current is not a substance. It might as well be contended

that because artificial electricity is produced by dynamos or other means, and is produced in houses, and is transmitted by means of wires, that because the dynamos or the houses or the wires are a substance or material, therefore electricity is a substance or material. Man is a substance. It might as well, therefore, be said that because man is a substance his thoughts are a substance or material. Man produces thought, utters thought by means of speech, but neither the sound of speech nor the thought spoken is a substance. Exactly so is it with electricity. Aye, more, man is charged with electricity, gives off electricity,, but such electricity is not a substance or material. A substance or material is tangible. Electricity is not.

I submit, therefore, that it is not true, as stated by relator, that it is a matter of common knowledge that gas and electricity are, because produced by the operation of heat on carbon, therefore, the same thing, either in cause or effect.

I apprehend, however, that this court will not undertake to determine this question upon any such lines, but that it will leave it for further investigation and proof.

II.

THE FIFTH DEFENSE INTERPOSED BY RESPONDENT IS THAT IT IS PROVIDED BY SEC. 2721, OF ART. 5, OF CHAPTER 42, REV. STATS. 1889, THAT NO COMPANY SHALL PLACE ITS WIRES OR OTHER FIXTURES UNDERGROUND IN ANY CITY UNLESS IT SHALL FIRST OBTAIN CONSENT FROM SAID CITY, THROUGH THE MUNICIPAL AUTHORITIES THEREOF.

Relator moves to strike out this defense because Sec. 2721 applies only to telegraph and telephone companies.

It is true that Sec. 2721 is a part of Art. 5 of Chap. 2 of the Revised Statutes 1889 in reference to telegraph and telephone companies, but respondent contends it is a part of the policy of the law in this State, begun in 1875, to vest in the municipalities of the State the right to regulate the use of the streets of such cities. It was formerly held to be the law that the title to all the highways in the State was vested in the State, notwithstanding the State paid no part of the cost of condemning and acquiring the same in the cities, and paid nothing toward maintaining the same, but, on the contrary, the cities were held liable for any injuries received on account of the highways being out of repair. This, however, has now been changed. Sec. 20 of Art. 12, of the constitution of 1875 prohibits the legislature from granting any right to construct and operate a street railroad in any city or on any public highway without the consent of the local authorities having control of the street or highway proposed to

be occupied. And also prohibits the transfer of such franchise without similar assent first obtained. Par. 2, of Sec. 26, of Art. 3, of the charter of the City of St. Louis (adopted by virtue of the authority conferred by Secs. 20 to 25, of Art. 9, of the constitution of 1875), gives the city the power "to establish, open, vacate, alter, widen, extend, pave, * * * all streets, avenues, sidewalks, alleys, wharves, and public grounds and squares, and to regulate the use thereof."

Thus the constitution prohibits the legislature from authorizing street railroads to be constructed and operated over the streets of a city without the consent of the city. Sec. 2721, Revised Statutes 1889, prohibits telegraph and telephone companies from placing their wires along, across or under the streets of such cities, without the consent of the city, and the charter of the City of St. Louis grants it the power to regulate the use of its streets. Taken together, it expresses the policy of the State to vest the power in the city or locality to control the use of the highways which have been acquired and are maintained and kept up at the expense of the locality, and all tends to prove the correctness of respondent's contention that no company has the right to use the streets of a city for private or *quasi* public purposes, without the consent of the locality or the city.

This conclusion was reached by the Supreme Court of the United States in the case of the City of St. Louis v. the Western Union Telegraph Company, 148 U. S. 92. On rehearing 149 U. S. 465.

If I am correct in this, it follows that relator's motion to strike out this defense should be overruled.

III.

THE SEVENTH DEFENSE INTERPOSED BY RESPONDENT IS THAT ON THE 2D OF MARCH, 1857, LIGHTING BY ELECTRICITY WAS WHOLLY UNKNOWN TO ART AND THAT THE GENERAL ASSEMBLY OF MISSOURI, BY THE ACT OF MARCH 2D, 1857, DID NOT, AND DID NOT INTEND TO CONFER UPON RELATOR, THE RIGHT TO MANUFACTURE AND VEND ELECTRICITY FOR LIGHTING PURPOSES.

Relator moves to strike out this defense as immaterial and irrelevant and as constituting no defense to the alternative writ; because it appears from the Act of March 2d, 1857, by the 5th section thereof, that relator was expresssly granted the right and privilege of making and vending gas, gas lights, gas fixtures and any substance or material that might then or thereafter be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of the act.

This concedes, as is the historical fact, that lighting by electricity, was wholly unknown to art in 1857. Unless, therefore, the Act of 1857, is by its terms, clearly and without doubt, broad enough to grant to relator rights and privileges which were wholly unknown to mankind, including relator and the legislature, at the date of the act, relator has no right to manufacture or vend electricity. The act in terms grants the right to manufacture and vend gas, gas lights, gas fixtures and any substance or material that might be used as a substitute therefor. Let it be particularly and especially noted that the

language of the act is not that relator is granted the right to manufacture and vend anything that may be used as a substitute for gas, but its right is restricted to the manufacture and vending of any *substance or material* which might be used as a substitute for gas. Gas is a substance or material. Electricity is neither. By the letter of the act, therefore, the right to manufacture and vend electricity is not granted. There is nothing in the context which would justify the contention that electricity was intended to be included in the grant of power. Inasmuch as lighting by electricity was unknown at that time, it cannot be said that it was the spirit or purpose of the legislature to grant the right to do that which was wholly unknown. I construe the grant, and the words "substance or material" employed therein, to mean just what it says, that is, gas or some other substance or material, like coal oil, candles or any substance or material producing light, but I cannot conceive that a legislature can be said to have granted rights of which both the legislature and the grantee and the whole world were ignorant at the time of the grant.

IV.

THE EIGHTH DEFENSE IS THAT LIGHTING BY ELECTRICITY WAS WHOLLY UNKNOWN TO ART ON THE 26TH OF MARCH, 1868, AND THEREFORE, THE LEGISLATURE DID NOT, AND DID NOT INTEND TO, CONFER UPON RELATOR, BY THE ACT OF 1868, THE RIGHT TO MANUFACTURE AND VEND ELECTRICITY FOR LIGHTING PURPOSES.

Relator moves to strike out this defense because it is immaterial and irrelevant and constitutes no defense, and, further, because the Act of 1868 granted relator the right to make and vend gas, gas lights or gas fixtures or any substance or material that might then, or thereafter, be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of said act; and, further, because the Act of 1868 confirmed to relator all the rights and privileges conferred upon it by the 5th section of the Act of 1857.

In this connection, it is important to note that the Act of 1868 confers no rights, privileges or franchises upon relator whether to manufacture gas or any substance or material that might be used as a substitute therefor nor to manufacture electricity at all. The act is not a complete act. It is not an amendment by implication. An amendment by implication must be a complete act in itself. If it is not; and if reference must be had to some other act to understand what was intended, then it is an

amendment to such other act, contrary to Sec. 25 of Art. 4 of the Constitution of 1865, and cannot be said to be a new law which by implication, supersedes and takes the place of a prior law.

The Act of 1868 is by itself wholly unintelligible as to the rights, privileges and franchises granted. In express terms it refers to the rights, privileges, and franchises granted by the 5th section of the act to which it is amendatory, thereby in terms calling it an amendment of the Act of 1857, and not an original legislative enactment, complete in itself, and intelligible without reference to any other act.

For these reasons it can be correctly stated that the Act of 1868 did not intend to confer any rights which were not conferred by the Act of 1857, and inasmuch as lighting by electricity was unknown to art in 1857, it is wholly immaterial to this inquiry whether it became known to art between 1857 and 1868, and what has been said above, in regard to the seventh defense, applies equally here.

Aside from this the motion admits that lighting by electricity was also unknown to art in 1868, and therefore what has been said in regard to the meaning of the term "substance or material" equally applies here.

Stare Decisis—Res Adjudicata.

To parry the force of respondent's contentions, relator insists that the Act of March 26th, 1868, has been adjudicated three times by the Supreme Court of Missouri, in the cases of St. Louis v. St. Louis Gas Light Co., 70 Mo. 69; St. Louis Gas Light Co. v. St. Louis, 86 Mo. 495, and State *ex rel.* City of

St. Louis v. Laclede Gas Light Company, 102 Mo. 473, decided respectively in 1879, 1885 and 1890; and that, on the faith of these judgments, certainly since 1890, great sums of money have been invested in the stock and securities of the company, contracts have been made and duties and obligations incurred which would now become worthless if the perpetuity of relator's charter is open to investigation or further decision.

A reference to the first case quoted (70th Mo. 69) fails to show that the Act of 1868 was referred to either in the briefs of counsel for either party to the suit, or in the opinion of the majority of the court, or in the minority opinions, or in the opinion on re-hearing. Inasmuch as the Laclede Gas Light Company was not a party of record in that case in the Supreme Court of Missouri, the question of the effect of the Act of 1868 was not before the court, and consequently could not be passed on by the court.

The second case referred to (86th Mo. 495) was a suit against the city to recover an amount alleged to be due the gas company from the city under a contract between the two. In this case the effect of the Act of 1868 upon section 6 of the Act of March 2d, 1857, is referred to, but none of the propositions involved in this case were raised, passed upon or adjudicated in that case.

The last case referred to (102d Mo. 472) was an original proceeding by *mandamus* in the Supreme Court of Missouri at the relation of the City of St. Louis against the Laclede Gas Light Company, to compel it to comply with the provisions of ordi-

nance 15,482, approved March 31st, 1890, whereby the city undertook to fix the price which the Laclede Gas Light Company might charge for gas furnished to the people of St. Louis. The Supreme Court held that inasmuch as the charter of the Laclede Gas Light Company did not fix the price it should charge for gas, the city had no power under its charter to regulate the matter. The questions raised and relied on by respondent in this case were not discussed or adjudicated.

A careful, or even a casual, examination of these three cases, therefore, fails to show that the Supreme Court of Missouri has ever adjudicated any of the propositions involved in this litigation, and all of the contentions of respondent with regard to the impairment of its bonds and stocks and contracts, therefore, dissipates like mist before the sun.

Conclusion.

The magnitude and importance of this case cannot be overstated. I believe that there has never been a case before this court since its organization, nor in fact any case before any court that ever was constituted, that involves as much in dollars and cents, or as much in baneful effects and consequences upon a municipality as the case at bar. If relator's contentions are true and are upheld by this court, there can be no money value placed upon its franchise. It stands in a class to itself. No other corporation in America would have as valuable a franchise. Moreover, it would be greater than the City of St. Louis, or the State of Missouri, itself. It would have a right not only to occupy as much of the streets, alleys and public places of the city above and below the surface thereof as it desired for its own use, but it would have the right to farm out to other persons, upon such terms as it saw fit, equal rights.

The people of the City of St. Louis, whose money bought the streets and keep the same in repair, would be powerless. The relator would be the greatest monopoly the world has ever known, not only from a business standpoint, but also from the standpoint of exercising and granting the powers of a sovereign over the highways of the city, without even being subject to the police regulation of inspection, and the city would have to stand supinely

by and see its streets dug up and marred at will without having power to require them to be properly replaced, and in addition would have to pay the damages occasioned to persons traveling over the same by reason of their being in a defective and dangerous condition.

It is confidently submitted to the court—this, the people's highest court—that no such calamity will be allowed to come upon us, if there is any legal method of preventing it, and that the defenses interposed by the respondent are each and all good, sufficient and complete defenses to the claims set up by relator, and hence that the demurrer and motion to strike out parts of respondent's return should both be overruled.

The Supreme Court of Missouri decided only the question of the sixth defense interposed by respondent, to-wit: that the ordinance regulations of the City of St. Louis, requiring relator to obtain a permit from the Board of Public Improvements before putting down any wires, tubes, cables, etc., was legal and constitutional, but did not decide whether the Act of 1868 was in conflict with Paragrah 2, of Section 1, of Article 8, of the Constitution of Missouri, nor whether it was in conflict with Section 25, of Article 4, of the Constitution of Missouri, 1865, nor whether relator's charter expired on the 2d of March, 1887, nor whether said charter will expire in 1917, nor whether said charter is a perpetual charter; neither did it decide whether, if relator's charter is still alive and valid, the relator has the right to manufacture and sell electricity; nor whether,

if relator has such rights itself, it can exercise such rights, and at the same time delegate to others a like privilege to exercise the same rights at the same time.

There can be no end to this litigation until these questions are decided. It is much to be regretted that the Supreme Court of Missouri did not pass upon them. Counsel for both sides urged that court to settle these questions, and on behalf of the defendants in error I here earnestly petition this Honorable Court to adjudicate these questions and set at rest these controversies. Until they are settled, the City of St. Louis must suffer. No definite policy can be adopted by the municipal authorities with reference to conduits, gas lighting, or electric lighting in the city until we know whether the city has the right to regulate the use of its own streets, or whether the Laclede Gas Light Company has a perpetual charter and the right to put down its conduits and lay its wires whenever and wherever it chooses, and also to delegate to other persons the same rights to be exercised at the same time. It is not too much to say that the City of St. Louis is far behind other cities of equal population in these respects, because our powers are clouded by the questions which have been raised in this case, and we must so remain, bringing up the rear of the procession of progress in municipal matters, until there has been an authoritative declaration by this court on these propositions. I apprehend that neither party would be satisfied with a decision from any tribunal in the United States inferior to this Honorable Court.

With all the earnestness at my command, I therefore respectfully urge this Honorable Court to pass on all the questions raised in this case.

Respectfully submitted,

W. E. Marshall

Attorney for Defendants in Error.